

Exhibit A

IN THE CHANCERY COURT FOR SHELBY COUNTY, TENNESSEE

KROGER LIMITED PARTNERSHIP I,

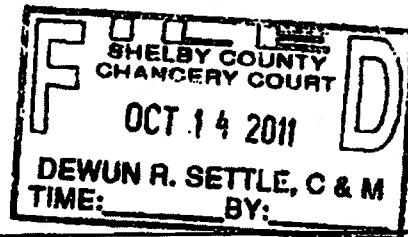
Plaintiff,

v.

Civil Case No. LH-11-1683-1

INLAND WESTERN MEMPHIS
WINCHESTER, LLC, and
AMERICAN HOME ASSURANCE
COMPANY,

Defendants.



COMPLAINT FOR DECLARATORY JUDGMENT,
BREACH OF CONTRACT, AND BAD FAITH

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT FOR
SHELBY COUNTY, TN:

COMES NOW, the plaintiff, Kroger Limited Partnership I (hereinafter "Kroger"), by and through its attorneys and the Law Firm of Spicer Rudstrom, PLLC, and pursuant to Tenn. Code Ann. § 29-14-101, et seq., Tenn. Code Ann. § 56-7-101, et seq., and the common law of the State of Tennessee, and files this Complaint for Declaratory Judgment, Breach of Contract, and Bad Faith, against the defendants, Inland Western Memphis Winchester, LLC (hereinafter "Inland"), and American Home Assurance Company (hereinafter "American Home") (collectively "defendants"), respectfully stating as follows:

PARTIES

1. Plaintiff, Kroger, is a foreign corporation authorized to do business in the State of Tennessee, and is organized and existing by virtue of the laws of the State of Ohio, with its principle place of business in Cincinnati, Ohio.

2. Inland is a foreign corporation authorized to do business in the State of Tennessee, and is organized and existing by virtue of the laws of the State of Delaware, with its principle place of business in Oak Brook, Illinois. Inland may be served with process in the State of Tennessee, through its registered agent, CT Corporation System, 800 S. Gay St., Suite 2021, Knoxville, TN 37929.

3. Defendant American Home is a foreign corporation authorized to do business in the State of Tennessee, and is organized and existing by virtue of the laws of the State of New York, with its principle place of business in New York, New York. American Home may be served with process in the State of Tennessee, through its registered agent, Department of Commerce and Insurance – Commissioner, located at 500 James Robertson Parkway, 5th Floor, Nashville, TN 37243.

JURISDICTION & VENUE

4. Jurisdiction is proper pursuant to Tenn. Code Ann. § 29-14-102.

5. Venue is proper pursuant to Tenn. Code Ann. § 20-4-101.

FACTS

6. On or about December 21, 2007, at approximately 8:18 p.m., Ms. Lillian Brooks, went to the Kroger store located at 7942 Winchester Road, in Memphis, Tennessee. Complaint at ¶ 8, attached hereto as Exhibit A.

7. On said date at said time, Ms. Brooks, while walking toward the front door of said Kroger store, was struck by a 2003 Dodge pick up truck, driven by Tuwayne Shivers. Exhibit A at ¶ 8.

8. On December 5, 2008, Lillian Brooks filed a lawsuit against Kroger, Inland, and

Tuwayne Shivers, (hereinafter "Suit") for injuries she allegedly sustained as a result of being struck by the Dodge truck. See Exhibit A. Said Suit is pending in the Circuit Court of Shelby County, Tennessee, and is styled as *Lillian Brooks and Anthony L. Brooks v. Tuwayne Shivers, The Kroger Company, and Inland Western Memphis Winchester, LLC*, Civil Case No.: CT-005853-08 (Division IV).

9. The Kroger store located at 7942 Winchester, Memphis, Tennessee, is part of the "Winchester Commons Shopping Center". See Lease Agreement, attached hereto as Exhibit B.

10. Kroger rents the real property in which it operates the Winchester store under a Lease Agreement executed on April 28, 1999. Defendant Inland bought the property on November 5, 2004. See Deposition of Brian Quinton Middleton, pp.12, 46, attached hereto as Exhibit C.

11. The Lease Agreement refers to the greater real property on Winchester Road as the "Shopping Center" and identifies two sub-parts therein: 1) the "Demised Premises," meaning the storeroom used by Kroger; and 2) the "Common Area," meaning the portions of the property not occupied by a building. Exhibit B, p. 1.

12. Under the Lease Agreement Kroger is responsible only for the interior of the Demised Premises, (Ex. B, p. 6), and the "Landlord," in this case Inland, was *alone* responsible for the Common area. (Ex. B, p. 5). More specifically, Inland was "responsible, at its sole cost and expense, for the repair, upkeep, maintenance, security, and replacement ... of all portions of the Common Area, including, but not limited to, parking areas and drives, pedestrian walkways, parking lot light standards ... [and] signs ..." (Ex. B p.5); Deposition of Middleton, pp. 13, 38, 54.

13. The Lease Agreement at Paragraph 11, further provides:

Landlord further shall maintain general public liability insurance over the Common Area with a combined bodily injury, death and property damage limit of [redacted] or more per occurrence. All insurance maintained in accordance herewith shall contain a waiver of subrogation against Tenant, shall name Tenant as an additional insured by endorsement to Landlord's policy, and shall be carried by an insurer qualified to conduct business in the state in which the Demised Premises are situated and rated 'A+XII' or higher by A.M. Best Company's Key Rating Guide, Property-Casualty. Prior to the date that Rental commences as provided hereunder, and thereafter upon request, Landlord shall furnish Tenant with a certificate of insurance and endorsement to Landlord's policy evidencing the type and amount of coverage set forth in this Paragraph and a provision that there will be no cancellation, reduction or non-renewal without giving Tenant thirty (30) days prior written notice thereof and a certified copy of an endorsement naming Tenant as an additional insured and stating that Landlord's insurance is primary. Notwithstanding anything contained herein to the contrary, *Landlord expressly releases Tenant for any damages to the Demised Premises, the Shopping Center and the Common Area or for any injuries incurred in the Shopping Center or the Common Area, irrespective of cause, which are customarily covered by the insurance required to be maintained in accordance with this Paragraph. By way of explanation, it is the intent of the preceding sentence that Landlord's insurance will answer to all claims for personal injuries or property damage arising from incidents or occurrences in the Common Area.*"

Exhibit B p. 8-9, emphasis added.

14. The Lease Agreement also provides: "Landlord [Inland] shall indemnify and save harmless Tenant [Kroger] from all claims, losses, damages and expenses, including without limitation reasonable attorneys' fees, arising out of Landlord's failure to maintain the ... Shopping Center in accordance with the Lease or any applicable law." Exhibit B, p. 9).

15. Kroger did not design, develop, or have any control of any areas exterior to the store itself, including the parking area and driving area. Deposition of Middleton, p. 36, attached hereto as Exhibit C.

¹ On October 15, 2010, the court entered an Order of Voluntary Non-Suit as to defendant Tuwayne Shivers.

16. It was the owner's decision and/or responsibility, not Kroger's, to erect stop signs within the parking area and/or crosswalks. Deposition of Middleton, p. 38, attached hereto as Exhibit C.

17. The subject accident occurred in the parking lot of the Winchester Commons Shopping Center. Exhibit B at ¶ 8.

18. The subject accident occurred in the area under the sole control and direction of Inland Western Memphis Winchester, L.L.C., and not of Kroger.

19. In addition to being entitled to a defense and indemnification under the Lease Agreement, Kroger is listed as an additional insured on Inland's Certificate of Liability Insurance which is an active policy (No.: GL4572271) (hereinafter "the Policy"), and was in full force and effect at the time of this incident. See Certificate of Liability Insurance, attached hereto as Exhibit D.

20. As such, Kroger hereby affirmatively pleads and asserts any and all policy provisions, terms definitions, endorsements, coverages and agreements contained within American Home Policy No.: GL4572271, deeming Kroger as an insured, and incorporates the same by reference as though fully copied and set forth herein in words and figures. Kroger further expressly invokes and asserts all rights, coverages, and other relief available to it or granted to it under the terms of the subject policy.

21. In light of the above facts, on February 19, 2009, counsel for Kroger sent a letter to counsel for Inland and American Home, tendering the defense of the Suit pursuant to the Lease Agreement. See Correspondence from Rick Rudstrom Esq., to David Feigelson, Esq., dated February 19, 2009, attached hereto as Exhibit E.

22. On February 16, 2011, counsel for Kroger sent another letter to counsel for Inland and American Home explaining that in addition to the indemnity provision in the Lease Agreement, Kroger had been "named as an additional insured on the policy of insurance affecting the property in question..." See Correspondence from Rick Rudstrom Esq., to David Feigelson, Esq, dated February 16, 2011, attached hereto as Exhibit F. Kroger's counsel also asked counsel for Inland and American Home to provide him "with a certified copy of the Policy No.: GL4572271, showing Kroger as an additional insured." Id.

23. In response to Kroger counsel for Kroger's February 16th letter, counsel for Inland and American Home expressly and deliberately denied that Kroger was named as an additional insured on the Policy and refused to provide Kroger with a certified copy of the Policy. See Correspondence from David Feigelson, Esq. to Rick Rudstrom, Esq., dated February 25, 2011, attached hereto as Exhibit G.

24. On March 1, 2011, Kroger's counsel responded to defense counsel's February 25th letter, and enclosed the Certificate of Insurance for Inland Western Retail which was effective for a coverage period of October 1, 2007 to December 1, 2008, and which "clearly provides that Kroger Company and its affiliates are to be additional insureds." Correspondence from Betty Ann Milligan, Esq. to Dave Feigelson, Esq., dated March 1, 2011, attached hereto as Exhibit H. Once again Kroger's counsel asked that Kroger be provided with a certified copy of the Policy, and requested that Inland and American Home assume the defense of Kroger in the Suit. Id.

25. On June 1, 2011, counsel for Kroger sent yet another letter to counsel for Inland and American Home advising defendants of Kroger's intent to file a Declaratory Judgment action "seeking defense, indemnification, recovery of expenses to Kroger for the defense of this

particular matter, as well as attorney's fees for pursuit of the Declaratory Judgment."

Correspondence from Betty Ann Milligan, Esq. to Dave Feigelson, Esq., dated June 1, 2011, attached hereto as Exhibit I.

26. Counsel for Kroger goes on to explain that "[i]t is our position that your clients['] continued refusal to acknowledge its obligations to the Kroger Company constitutes bad faith. This bad faith refusal to honor the terms of the contractual agreement between the parties is totally unacceptable and a clear violation of the applicable law." Id.

27. To date, neither Inland nor American Home has agreed to assume the defense of Kroger and, as a result, Kroger has incurred and continues to incur, significant attorneys' fees and expenses in having to defendant the Suit. Further, neither company has agreed to be responsible for any potential judgment rendered against Kroger in the Suit.

28. Said refusal to assume the defense of Kroger was made in bad faith and without substantial justification, and such refusal has inflicted additional expense, loss, and/or injury including attorney fees upon Kroger. As a result, defendants are in clear violation of Tenn. Code Ann. § 56-7-105, and should be subjected to the penalties available under the statute.

29. Kroger requests that this Court declare the rights and legal obligations of the entities interested under American Home Policy No.: GL4572271.

30. Kroger requests that this Court also declare the rights and legal obligations of the entities interested under the Lease Agreement.

31. A real controversy now exists between Kroger and Inland and American Home as to whether the policy of insurance issued by American Home to Inland, provides liability

coverage, including a duty to defend and/or indemnify or otherwise represent Kroger in the Suit filed by Lillian Brooks.

32. A real controversy also exists between Kroger, Inland, and American Home, as to whether the Lease Agreement triggers a duty on the part of Inland and/or American Home to defend and/or indemnify or other wise represent Kroger in the Suit. A real controversy also exists with respect to whether Inland and/or American Home breached the Lease Agreement between the parties.

33. Finally, a real controversy also exists between Kroger, Inland, and American Home, as to whether Inland and/or American Home acted in bad faith in their refusal to assume the defense of Kroger in the Suit and/or to agree to indemnify Kroger in the event that a judgment was/is rendered against Kroger.

34. In order to terminate the controversy and the uncertainty concerning the existence and/or extent of liability coverage, and the existence of any duties owed by Inland and/or American Home to Kroger in the context of the Suit, it is necessary that a declaration be made as to the rights and obligations of Kroger, Inland and American Home, under the Lease Agreement, the Policy, and Tenn. Code Ann. § 56-7-105.

WHEREFORE, THE FOREGOING PREMISES CONSIDERED, Kroger Limited Partnership I, prays that this Honorable Court determine and adjudicate the rights of the parties and declare and decree the following:

(a) That under the Lease Agreement, Inland and/or American Home have a duty to defend and/or indemnify Kroger with respect to all attorneys' fees, costs, expenses, and/or any judgment arising out of Civil Case No.: CT-005853-08;

- (b) That as a result of defendants' unwillingness to accept tender of the defense of the Suit, Inland and/or American Home are in breach of the Lease Agreement;
- (c) That under American Home Policy No.: GL4572271, Inland and/or American Home have a duty and obligation to defend Kroger, in connection with Civil Case No.: CT-005853-08;
- (d) That under American Home Policy No.: GL4572271, Inland and/or American Home have a duty and obligation to pay any sums for liability relating to, pertaining to, or in connection with the allegations in Civil Case No.: CT-005853-08;
- (e) That under American Home Policy No.: GL4572271, Inland and/or American Home have a duty and obligation to pay any and all judgments rendered against Kroger in Civil Case No.: CT-005853-08;
- (f) That under American Home Policy No.: GL4572271, Inland and/or American Home have a duty and obligation to pay any and all agreed settlements entered into by Kroger and the plaintiffs in Civil Case No.: CT-005853-08;
- (g) That under American Home Policy No.: GL4572271, Inland and/or American Home have a duty and obligation to reimburse Kroger, for all attorneys' fees, costs, and expenses incurred in defending Civil Case No.: CT-005853-08;
- (h) That as a direct and proximate result of defendants' unwillingness to accept tender of the defense of the Suit, Inland and/or American Home are in breach of American Home Policy No.: GL4572271;
- (i) That as a direct and proximate result of Inland's and/or American Home's bad faith refusal to assume the defense of Kroger and agree to indemnify Kroger for any potential

judgment, Inland and American Home are in violation of Tenn. Code Ann. § 56-7-105 and, as a result, Kroger suffered additional expense, loss, or injury.

(j) That this Court grant Kroger damages including the costs, expenses and attorneys' fees incurred by Kroger in having to defend the underlying suit, the costs expenses and attorneys' fees incurred by Kroger in having to prosecute this Declaratory Judgment Action, and an additional 25 percent damage award as the "bad faith penalty" pursuant to Tenn. Code Ann. § 56-7-105.

(k) That this Court grant such additional and further relief to which Kroger may be entitled.

Respectfully submitted,

SPICER RUDSTROM, PLLC

BY:

BETTY ANN MILLIGAN (TN Bar No.: 11299)
175 Toyota Plaza, Suite 800
Memphis, Tennessee 38103
(901) 523-1333
Counsel for Plaintiff,
Kroger Limited Partnership I

J:\Data\BAM\42340\Declaratory Judgment Action\Complaint For DJ & Breach Of Contract Doc2.Doc

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

LILLIAN BROOKS and
ANTHONY L. BROOKS,

Plaintiffs,

vs.

12-5200 No.

CT-005835-08

JURY DEMANDED

NOTIFY

TUWAYNE SHIVERS,
THE KROGER COMPANY
A Corporation, and
INLAND WESTERN MEMPHIS
WINCHESTER, LLC,

Defendants.

FILED
DEC 6 2012

**COMPLAINT FOR PERSONAL INJURIES AND
LOSS OF CONSORTIUM**

COME NOW, the Plaintiffs, Lillian Brooks and Anthony L. Brooks, by and through undersigned counsel and for their cause of action against Defendants, Tuwayne Shivers, The Kroger Company and Inland Western Memphis Winchester, allege as follows:

JURISDICTION AND VENUE

1. Plaintiff Lillian Brooks ("Brooks") is a resident citizen of Memphis, Shelby County, Tennessee.
2. Plaintiff Anthony L. Brooks ("Anthony Brooks") is a resident citizen of Memphis Shelby County, Tennessee. Plaintiff Anthony Brooks is the adult child of Plaintiff Brooks and is wholly dependent upon her for his care, sustenance and wellbeing.
3. Defendant Tuwayne Shivers ("Shivers"), upon information and belief, is a resident citizen of Memphis, Shelby County, Tennessee.



4. Defendant The Kroger Company ("Kroger") is a foreign corporation licensed to do business in Memphis, Shelby County, Tennessee, and can be served with process through its registered agent, Corporation Service Company.

5. Defendant Inland Western Memphis Winchester, LLC ("Inland") is a foreign limited liability corporation licensed to do business in Memphis, Shelby County, Tennessee, and can be served with process through its registered agent, CT Corporation System.

6. Venue is appropriate in Shelby County, Tennessee pursuant to T. C. A. § 20-4-101.

FACTS

7. At all times material hereto, Plaintiff Brooks was conducting herself in a prudent and cautious manner and was in no way negligent and was free of any comparative negligence.

8. On or about December 21, 2007 at approximately 8:18 p.m., Plaintiff Brooks was walking toward the front door of the Kroger store located at 7942 Winchester Road, in Memphis, Tennessee, for the purpose of purchasing groceries. At or about the same time, Defendant Shivers, while operating a 2003 Dodge pickup truck, negligently drove through the parking lot and struck Plaintiff Brooks with his vehicle.

9. As a result of the above described accident, Plaintiff Brooks suffered severe, painful and permanent injuries as set forth more fully hereinafter.

10. On December 21, 2007, the Kroger parking lot did not have a crosswalk leading from the parking lot to the store.

11. On December 21, 2007, the Kroger parking lot did not have sufficient lighting.

12. On December 21, 2007, the Kroger parking lot did not have stop signs facing incoming and outgoing traffic near the store entrance.

13. On December 21, 2007, the Kroger parking lot did not have speed bumps or any other mechanism to slow traffic at or near the entrance to its store.

COUNT I – NEGLIGENCE OF TUWAYNE SHIVERS

14. Plaintiffs allege that the acts of Defendant Shivers proximately caused this accident and that Defendant Shivers was guilty of one or more of the following acts of common law negligence which were the direct and proximate cause of the accident and the Plaintiffs' resulting injuries and damages:

- (a) Defendant Shivers negligently failed to maintain a proper lookout;
- (b) Defendant Shivers negligently failed to maintain proper control of his vehicle;
- (c) Defendant Shivers negligently failed to exercise that degree of care and caution which was reasonable and commensurate with the then existing circumstances;
- (d) Defendant Shivers negligently failed to devote full time and attention to operating his vehicle;
- (e) Defendant Shivers negligently operated his vehicle in a wanton and reckless manner; and
- (f) Defendant Shivers negligently failed to yield the right-of-way.

15. Plaintiffs allege that Defendant Shivers is guilty of violating one or more of the following Ordinances of Shelby County, each of which was in full force and effect at the time and place of the accident, the violation of which constitutes negligence per se and which is the direct and/or proximate cause of the accident and Plaintiffs' resulting injuries and damages:

- (a) **20-38. Duty to devote full time and attention to operating vehicle.**

It shall be unlawful for a driver of a vehicle to fail to devote full time and attention to operating such vehicle when such failure, under the then existing circumstances, endangers life, limb or property.

(b) **20-39. Duty to drive at safe speed, maintain lookout and keep vehicle under control.**

Notwithstanding any speed limit or zone in effect at the time, or right-of-way rules that may be applicable, every driver shall:

(2) Maintain a safe lookout.

(3) Use due care to keep his vehicle under control.

(c) **20-43. Emerging from or entering alley, private driveway or building.**

The driver of a vehicle entering into a street or highway, either from an alley or from a private road, driveway or building, shall yield the right-of-way...to all vehicles approaching on such street or highway, and it shall be the duty of the driver of every vehicle so entering a street or highway to bring his vehicle to a stop and not enter therein until same may be done with safety and without danger to others using the street or highway, and he shall proceed with caution.

16. Plaintiffs allege that Defendant Shivers is guilty of violating one or more of the following Ordinances of the City of Memphis, each of which was in full force and effect at the time and place of the accident, the violation of which constitutes negligence per se and which is the direct and/or proximate cause of the accident and Plaintiffs' resulting injuries and damages:

(a) **20-112. Duty to devote full time and attention to operating vehicle.**

It shall be unlawful for a driver of a vehicle to fail to devote full time to operating such vehicle when such failure, under the then existing circumstances, endangers life, limb or property.

(b) **20-127. Duty to drive at safe speed, maintain lookout and keep vehicle under control.**

Notwithstanding any speed limit or zone in effect at the time, or right-of-way rules that may be applicable, every driver shall:

(2) Maintain a safe lookout.

(3) Use due care to keep his vehicle under control.

(c) **20-142. Emerging from alley, private driveway or building.**

The driver of a vehicle entering into a street or highway, either from an alley, from a private road or driveway of a building, shall yield the right-of-way...to all vehicles approaching on such street, and it shall be the duty of the driver of every vehicle so entering a street or highway to bring his vehicle to a stop and not enter therein until same may be done with safety and without danger to others using the street, and he shall proceed with caution.

17. Plaintiffs allege that Defendant Shivers is guilty of violating one or more of the following Statutes of the State of Tennessee, each of which was in full force and effect at the time and place of the accident, the violation of which constitutes negligence per se and which is the direct and/or proximate cause of the accident and Plaintiffs' resulting injuries and damages:

A. T.C.A. § 55-10-205 - Reckless driving.

(a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property commits reckless driving.

18. Plaintiffs allege that as the direct and proximate result of the foregoing acts of negligence and the violations of the Ordinances of Shelby County, Tennessee, the Ordinances of the City of Memphis, Tennessee and the violations of the Statutes of the State of Tennessee, the Plaintiffs incurred and continue to incur injuries and damages including:

- (a) painful and permanent injuries including, but not limited to broken bones;
- (b) physical pain and mental anguish;
- (c) impaired ability to enjoy the normal pleasures of life;
- (d) a loss of earning capacity;
- (e) medical bills and expenses, past and future; and
- (f) loss of consortium.

COUNT II - NEGLIGENCE OF KROGER

Plaintiffs incorporate by reference as if fully set forth verbatim each and every allegation in the Complaint.

19. At all times material hereto, Plaintiff Brooks was a business invitee of Defendant Kroger, having the intention to enter the store and purchase grocery items.

20. Defendant Kroger was negligent in the design of its parking lot or was otherwise negligent in not providing a crosswalk, adequate lighting, stop signs, a mechanism to slow traffic at the store's entrance or maintaining the premises in a safe and prudent manner, as it was foreseeable that a pedestrian would be struck by a vehicle at night in the absence of such precautions, and Defendant Kroger knew or should have known of the danger inherit in such a situation by the exercise of reasonable care.

21. Defendant Kroger was under a duty to use reasonable diligence and due care to keep its parking area safe for pedestrians who were crossing into its store which it failed to do.

22. Defendant Kroger, owing a duty to Plaintiff Brooks, was guilty of the following acts of common law negligence which were the direct and proximate causes of the accident and injuries described herein:

- (a) Failure to use ordinary care to maintain the premises in a reasonably safe condition;
- (b) Failure to create, make, or establish a safe method of crossing into and from the store, when Kroger knew or should have known that individuals including Lillian Brooks, depended upon it to provide a means of safe crossing on behalf of its business invitees;
- (c) Failure to remove dangerous conditions when the risk of harm was foreseeable and unreasonable and the conditions caused by the lack of safety precautions had existed for such a length of time that Kroger knew or should have known or discovered the conditions in the exercise of reasonable care; and
- (d) Failure to remove the dangerous conditions which existed where there was a high degree of foreseeability of harm and the gravity of the harm versus the burden placed on Defendant Kroger would have been minimum to protect Lillian Brooks.

COUNT III - NEGLIGENCE OF INLAND

Plaintiffs incorporate by reference as if fully set forth verbatim each and every allegation in the Complaint.

23. At all times material hereto, Plaintiff Brooks was a business invitee of the Defendant Inland, having the intention to enter Inland's premises and purchase grocery items.

24. Defendant Inland was negligent in the design of the parking lot and in failing to provide crosswalks, adequate lighting, stop signs, a mechanism to slow traffic at the store's entrance or otherwise maintain the premises in a safe and prudent manner as it was foreseeable that a pedestrian would be struck by a vehicle at night in the absence of such precautions. Defendant Inland knew or should have known of the danger inherit in such a situation by the exercise of reasonable care.

25. Defendant Inland was under a duty to use reasonable diligence and due care to keep the parking area of its tenants safe for pedestrians which it failed to do.

26. Defendant Inland, owing a duty to Plaintiff Brooks, was guilty of the following acts of common law negligence which were the direct and proximate causes of the accident and injuries described herein:

- (a) Failure to use ordinary care to maintain the premises in a reasonably safe condition;
- (b) Failure to create, make, or establish a safe method of crossing into and from the store, when Landlord knew or should have known that individuals including Plaintiff Brooks, depended upon it to provide a means of safe crossing on behalf of its business invitees;
- (c) Failure to remove dangerous conditions when the risk of harm was foreseeable and unreasonable and the conditions caused by the lack of safety precautions had existed for such a length of time that Landlord knew or should have known or discovered the conditions in the exercise of reasonable care; and

- (d) Failure to remove the dangerous conditions which existed where there was a high degree of foreseeability of harm and the gravity of the harm versus the burden placed on Defendant Landlord would have been minimum to protect Plaintiff Brooks.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Brooks prays that judgment be entered against the Defendants in the amount of \$1,450,000.00 in compensatory damages. Plaintiff Anthony Brooks prays that judgment be entered against the Defendants in the amount of \$100,000.00. A jury is demanded to try this case.

Respectfully submitted,

GLANKLER BROWN, PLLC



Saul C. Belz (BPR #4346)
Robert B. C. Hale (BPR #13261)
One Commerce Square, Ste. 1700
Memphis, Tennessee 38103
(901) 525-1322
Attorneys for Plaintiffs

(KNOXVILLE/CIRCUIT) COURT OF TENNESSEE
140 ADAMS AVENUE MEMPHIS, TENNESSEE 38103 RECEIVED,
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, TENNESSEE,
STATE OF TENNESSEE

NO. CT-C-5F35-08

SUMMONS IN CIVIL ACTION

AD DAMNUM \$ _____

2008 DEC 9 PM 2:09
2008 DECEMBER 9 PM 2:09LILLIAN BROOKS, and
ANTHONY L. BROOKS.RUELLA L.
Home Address
SECRETARY OF STATE
STATE

vs. PLAINTIFFS

Business Address

TUWAYNE SHIVERS,
THE KROGER COMPANY, and
INLAND WESTERN MEMPHIS WINCHESTER, LLC

Home Address

DEFENDANTS

Business Address

TO THE DEFENDANT(S): The Kroger Company (Serve through Secretary of State)
c/o Corporation Service Company, Registered Agent
2908 Poston AvenueNashville, TN 37203

You are hereby summoned and required to defend a civil action by filing your answer with the Clerk of the Court and serving a copy of your answer to the Plaintiff on Saul C. Belz and Robert B. C. Hale Plaintiff's attorney, whose address is 1700 One Commerce Square, Memphis, TN 38103, telephone 525-1322 within THIRTY (30) DAYS after this summons has been served upon you, not including the day of service. If you fail to do so, a judgment by default may be taken against you for the relief demanded in the Complaint.

JIMMY MOORE, Clerk

KENNY ARMSTRONG, Clerk & Master

TESTED AND ISSUED 12/15, 2008 By RBL, D.C.

TO THE DEFENDANT(S):

NOTICE: Pursuant to Chapter 919 of the Public Acts of 1980, you are hereby given the following notice: Tennessee law provides a four thousand dollar (\$4,000) personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt with the Clerk of the Court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will not be effective as to any execution or garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed. These include items of necessary wearing apparel (clothing) for yourself and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible and school books. Should any of these items be seized, you would have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer.

COST BOND

I hereby acknowledge and bind myself for the prosecution of this action and payment of all costs not to exceed \$500.00 in this court which may at any time be adjudged against the plaintiff in the event said plaintiff shall not pay the same.

Witness My Hand this _____ day of _____, 20 _____

Certification when applicable

Surety

I, KENNY ARMSTRONG, Clerk & Master
of the Chancery Court, Shelby County,
Tennessee, certify this to be a true and
accurate copy as filed this _____
KENNY ARMSTRONG, Clerk & Master

I, JIMMY MOORE, Clerk of the Circuit
Court, Shelby County, Tennessee, certify
this to be a true and accurate copy as filed
this 12/15/08
JIMMY MOORE, Clerk

By: _____, D.C.

By: RBL, D.C.

RETURN ON SERVICE OF SUMMONS

I HEREBY CERTIFY THAT I HAVE SERVED THE WITHIN SUMMONS:

By delivering on the _____ day of _____, 20____ at _____ M.
a copy of the summons and a copy of the Complaint to the following defendants

Mark Luttrell, Sheriff

By _____

Deputy Sheriff

PRIVATE PROCESS SERVER

I HEREBY CERTIFY THAT I HAVE SERVED THE WITHIN SUMMONS:

By delivering on the _____ day of _____, 20____ at _____ M. a copy of the
summons and a copy of the Complaint to the following defendants

(PLEASE PRINT THE FOLLOWING)

Private Process Server

Address

Company

Phone

Other manner of service:

Signature

I hereby certify that I have NOT served this Summons on the within named defendant(s) _____

because _____ is / are not to be found in this County for the
following reason(s): _____

Mark Luttrell, Sheriff

This _____ day of _____, 20____. By _____ Deputy Sheriff

NO. CT-C-5835-08 D.

IN THE
~~STATE~~ CIRCUIT
COURT
OF TENNESSEE
FOR THE THIRTIETH
JUDICIAL DISTRICT AT MEMPHIS

SUMMONS IN CIVIL ACTIONS

Lillian Brooks and
Anthony L. Brooks

PLAINTIFF

TuWayne Shives vs. The Kroger Co and
Inland Western Memphis Winchester LLC

DEFENDANT

Came to hand _____

Saul C. Belz
Robert B. C. Hale
Attorney for Plaintiff

Tel. No. (901) 525-1322

Back

V-437 - 04/26/99

LEASE AGREEMENT

THIS LEASE AGREEMENT dated 28th day of April, 1999, by and between ORCHID, L.L.C., an Alabama limited liability company, successor in interest to Faison-Winchester Commons Limited Partnership, a North Carolina limited partnership ("Landlord"), and KROGER LIMITED PARTNERSHIP I, an Ohio limited partnership ("Tenant").

WITNESSETH:

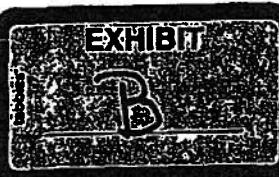
WHEREAS, Landlord and Tenant have entered into a certain Ground Lease Amendment No. 1 of even date herewith amending the Ground Lease dated December 16, 1997 (the "Ground Lease"), between Tenant and Landlord's predecessor in interest, which Ground Lease Amendment No 1 is entered into for the purpose of redefining the premises unto Tenant under the Ground Lease as the storeroom ("Demised Premises") which is outlined in red on the plot plan ("Plot Plan") attached hereto as Exhibit "A" and made a part hereof and located in the Winchester Commons Shopping Center ("Shopping Center") situated in the City of Memphis, County of Shelby, and State of Tennessee and described more particularly in the above-described Lease; and

WHEREAS, Landlord and Tenant desire to enter into this Lease Agreement in furtherance of the Ground Lease, as amended by Ground Lease Amendment No. 1, which Ground Lease and Lease Agreement are hereinafter collectively referred to as the "Lease".

NOW, THEREFORE, in consideration of Ten Dollars (\$10.00), the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant agree as follows:

1. CONSTRUCTION

A. DESIGN AND CONSTRUCTION. Tenant acknowledges that it has constructed the Demised Premises, and Tenant accepts same in the condition in which it now exists in accordance with all applicable laws, rules, ordinances and regulations, state, federal and local, and in substantial accordance with the Plot Plan which shows all buildings as well as driveways, sidewalks, parking spaces and vehicular access points to adjacent roadways situated in the Common Area. The term "Common Area" as used herein shall mean the improved portions of the Shopping Center not occupied by building area as shown on the Plot Plan.



B. LANDLORD'S CONSTRUCTION AND ENVIRONMENTAL

WARRANTIES. Landlord warrants (i) that during the term of the Lease the that the Landlord shall maintain the Demised Premises in good condition to the extent required by the provisions of the Lease, (ii) that the Demised Premises and the Shopping Center shall be modified (if necessary) in accordance with all applicable laws, rules, ordinances and regulations, state, federal and local as well as the Requirements and the Plans unless there is a conflict between the Plans and the Requirements, in which event the Plans shall control and (iii) Landlord knows of no environmental contamination or violation with respect to the Shopping Center in general and the Demised Premises in particular.

C. HAZARDOUS MATERIALS

(i) As used herein, the term "Hazardous Material" means any hazardous or toxic substance, material or waste (including, without limitation, asbestos) which, now or in the future, is determined by any state, federal or local governmental authority to be capable of posing a risk of injury to health, safety or property and/or the use and/or disposal of which is regulated by any governmental authority, including any hazardous substance or waste as defined by the Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901, et seq., as amended ("RCRA") or the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Sections 9601 et seq., as amended ("CERCLA"), and any rules and regulations now or hereafter promulgated under either of such acts or other laws or regulations. Tenant shall not cause or permit any Hazardous Material to be brought upon, generated, treated, kept or used in or about the Premises by Tenant, its agents, employees, contractors or invitees (provided that this provision shall not prohibit Tenant from using, in the ordinary course of Tenant's business operation, Hazardous Materials in such forms, types, quantities and uses as are permitted under applicable legal requirements, provided that Tenant complies with all such legal requirements, including without limitation any reporting requirements).

(ii) Landlord shall be responsible for abatement, removal and/or remediation of Hazardous Materials introduced into the Demised Premises or the Shopping Center by Landlord, its agents, contractors or employees or other tenants and occupants of the Shopping Center. In the event that such Hazardous Materials are present in the Demised Premises and such presence is due to Landlord's actions, Landlord shall have the obligation to encapsulate or remove, transport and dispose of such Hazardous Materials in the manner prescribed by applicable federal, state, or local law or regulation, unless and except if the same are not required by law to be abated, encapsulated or disposed of and its presence is not a violation of any law, in which event no action shall be required of Landlord.

(iii) During any such abatement, removal and/or remediation procedure by Landlord, Tenant's Rental and all other recurring monthly charges under this Lease shall abate for the period that Tenant is required to be closed for such abatement.

(iv) Tenant shall be responsible for abatement of Hazardous Materials introduced into the Shopping Center by Tenant or its agents, contractors or employees. In the event that such Hazardous Materials are present in the Shopping Center, Tenant shall have the obligation to encapsulate or remove, transport and dispose of such Hazardous Materials in the manner prescribed by applicable federal, state, or local law or regulation, unless and except if the same are not required by law to be abated, encapsulated or disposed of and its presence is not a violation of any law, in which event no action shall be required of Tenant.

(v) Tenant shall indemnify and hold Landlord harmless with respect to all liability, loss and expense arising out of the existence of Hazardous Materials introduced into the Shopping Center by Tenant or its agents, contractors or employees. This indemnity shall not apply to liability, loss or expense which arise from the acts or omissions of Landlord, its agents, contractors or employees.

2. SUBSEQUENT GOVERNMENT REQUIREMENTS. Landlord shall furnish any apparatus or material and shall perform such work in or about the Demised Premises and the Shopping Center as may be required by any governmental authority, unless such requirements are imposed solely by reason of the particular type of business conducted in the Demised Premises and are not covered by the Plans, and result not from Landlord's or its employees', agents' or contractors errors or omissions, in which case, Tenant shall furnish such apparatus or material and shall perform such work.

3. RENTAL. Beginning on May 1, 1999, Tenant shall pay Landlord the sum of Forty Thousand Nine Hundred Eighty and no/100 Dollars (\$40,980.00) per month for the primary term of Tenant's occupancy of the Premises payable in advance as rental ("Rental") for the Demised Premises. Rental for a partial month shall be prorated and adjusted by the parties.

Beginning with the first month of the First Renewal Option, if exercised by Tenant, the Rental will be Forty-one Thousand Eighty-six and 40/100 Dollars (\$41,086.40).

Rental payable by Tenant to Landlord on successive renewal options, if exercised by Tenant, will be as follows:

2nd five year renewal	\$41,192.40	per month
3rd five year renewal	\$41,298.40	per month
4th five year renewal	\$41,404.40	per month

5th five year renewal	\$41,510.40	per month
6th five year renewal	\$41,616.40	per month

4. PERCENTAGE PAYMENTS. Tenant shall pay to Landlord a sum of money ("Percentage Payment") equal to one percent (1%) of gross retail sales ("Sales") in excess of Forty-nine Million, One Hundred Seventy-six Thousand, Four Hundred Thirty and no/100 Dollars (\$49,176,430.00) ("Minimum Sales Base") made from the Demised Premises during each Lease year. The Minimum Sales Base shall be determined by multiplying the Annual Rental times 100. The actual sales base will be determined by the Annual Rent paid by Tenant to Landlord. Amounts in excess of the Maximum Percentage Payment shall not accumulate from year to year. Tenant shall furnish Landlord a report of Sales and shall pay Landlord any Percentage Payment earned in accordance with this Paragraph within ninety (90) days after the expiration of each Lease year. The term "Sales" as used herein shall exclude: cash discounts; rebates; refunds; allowances to customers; the exchange of merchandise between the stores of Tenant; discount sales to dentists or physicians; sales, excise or other taxes imposed by any governmental authority; cost of trading stamps; sales of fixtures or equipment; extraordinary sales and those other than in the normal course of business; sales of cigarettes; and sales of beer, wine and other alcoholic beverages. Receipts earned from: any banking, financial, insurance or similar commercial enterprises; optical, dental or other professional services; dry cleaning, beauty salons or other non-professional services conducted in the Demised Premises; lottery tickets, money orders or other negotiable instruments; vending machines, arcade games, or leasing of equipment or products; or sales generated from licensed or sublet departments or concessions shall constitute Sales only to the extent that Tenant earns income from same. The term "Lease year" as used in this Paragraph shall mean a period of twelve successive calendar months, the first of which shall commence on the commencement date of the base term of the Lease, provided that it shall include any time period preceding such date during which Tenant is open for business so long as the Minimum Sales Base shall be increased pro rata for any additional time period, but shall not be decreased should Tenant open for business after such commencement date. In the event that the Lease continues on a month-to-month basis after the expiration hereof, the Percentage Payment either shall be calculated on an annual basis if the Lease is in effect for a full year or shall be calculated on a monthly basis based on the proration of the Minimum Sales Base corresponding to the time period during which the Lease is in effect. In the event that the Lease so continues on a month-to-month basis after the expiration, the Percentage Payment shall be paid within ninety (90) days after the expiration of each Lease year or the earlier termination of such month-to-month tenancy.

The Percentage Payment shall not constitute Rental, but rather shall be a bonus to Landlord, and shall be payable only in the event of actual Sales made from the Demised Premises in accordance with this Paragraph. Should Tenant cease to conduct business operations

in the Demised Premises, irrespective of cause, it shall be relieved from the obligation for any Percentage Payment which might have been due Landlord if Tenant were to continue business operations therein.

Any payments made by Tenant pursuant to Paragraphs 21A, 21B and 21C of this Lease Agreement shall be non-cumulative offsets or credits against any Percentage Payment due in the year in which such payments are made by Tenant.

5. LANDLORD'S DUTY TO MAINTAIN THE COMMON AREA. Subject to Tenant's reimbursement obligation under Paragraph 21B of this Lease Agreement, Landlord shall be responsible, at its sole cost and expense, for the repair, upkeep, maintenance, security, and replacement (hereinafter "CAM Obligations") of all portions of the Common Area, including, but not limited to, parking areas and drives, pedestrian walkways, parking lot light standards, sidewalks, ramps, uncovered docks and dock walls, signs (except Tenant's standard pylon and facia signs) and landscaping. The CAM Obligations shall be performed by Landlord with such diligence and in the same manner as performed in similar first class retail shopping centers in the metropolitan Atlanta area. Snow, ice and debris removal shall be performed by Landlord with such frequency as is necessary to prevent an accumulation of same. In the event that Tenant believes, in Tenant's reasonable judgment, that Landlord has failed to perform any CAM Obligation in the manner and to the standards required herein, it shall be entitled, after giving Landlord and any mortgagee of Landlord of which Tenant has received written notice of its name and address ten (10) days prior written notice, to perform any or all of such CAM Obligations on behalf of Landlord, and to deduct all reasonable, actual costs incurred by reason thereof from Rental, Percentage Payments or other payments due under the Lease. Should Landlord commence to cure within such ten (10) day period, then Landlord shall have an additional thirty (30) days to perform its CAM Obligations before Tenant may exercise its rights set forth herein, provided Landlord pursues such cure continuously and diligently to completion in Tenant's sole reasonable judgment. In the event of an emergency threatening injury to persons or property, only such notice as is reasonable under the circumstances (if any) shall be required for Tenant to cure and deduct its costs as set forth above.

6. A. LANDLORD'S DUTY TO MAINTAIN THE DEMISED PREMISES. Subject to Tenant assigning to Landlord all applicable warranties, Landlord shall keep and maintain in good repair, and in the same manner as performed in similar first class retail shopping centers in the metropolitan Memphis area, the exterior and structure of the Demised Premises, including without limitation, roof, support columns, footers, exterior light fixtures, sprinklers, electrical switch gear, and subfloor, and Landlord shall maintain all exterior utility and service lines necessary for the operation of the Demised Premises and Common Area, including without

limitation all pipes, gauges, pumps, drains and wiring. In the event that Tenant believes, in Tenant's reasonable judgment, that Landlord has failed to keep the exterior and structure of the Demised Premises and the external lines serving the Demised Premises and the Common Area in the required state of repair, it shall be entitled, after giving Landlord and any mortgagee of which Tenant has received written notice of its name and address thirty (30) days prior written notice, to perform such work on behalf of Landlord and to deduct any reasonable, actual costs incurred by reason thereof from Rental, Percentage Payments or other payments due under the Lease. Should Landlord commence to cure within such thirty (30) day period, then Landlord shall have an additional ninety (90) days or if such cure is not capable of completion within such time frame such additional time as is reasonably necessary to perform its exterior, structural, and exterior line maintenance obligations before Tenant may exercise its rights set forth herein, provided Landlord commences such cure within such thirty (30) day period and continuously and diligently pursues such cure to completion, in Tenant's sole reasonable judgment. In the event of an emergency threatening injury to persons or property, no notice shall be required for Tenant to cure and deduct its costs as set forth above.

B. ACCESS BY LANDLORD. During the term of the Lease, Landlord and its management agent and their employees and representatives may inspect the Demised Premises at such reasonable times provided such persons do not unreasonably interfere with Tenant's operations. At any time during the ninety (90) days immediately preceding the expiration of the Lease, or at any time after Tenant is held to be in default of the Lease and the Lease is terminated, Landlord and Landlord's management agent shall have the right to show the Demised Premises and all parts thereof to prospective tenants between the hours of 9:00 A.M. and 9:00 P.M. on any day except days on which Tenant is closed for business.

C. TENANT'S DUTY TO MAINTAIN THE DEMISED PREMISES. Tenant shall keep and maintain those portions of the interior of the Demised Premises not required to be maintained by Landlord pursuant to Paragraph 6A or elsewhere under the Lease in good repair and keep the interior clean and free of debris, and shall keep and maintain all heating, ventilation and air conditioning equipment and water heaters ("Equipment") in the Demised Premises, all subject to ordinary wear and tear, fire or other casualty. Tenant further shall keep and maintain in good repair all entrance and exit doors, plate glass and exterior signage on the Demised Premises, subject to ordinary wear and tear, fire or other casualty. Landlord shall reimburse Tenant no later than sixty (60) days prior to the termination or cancellation of the Lease for the cost incurred by Tenant in the replacement of any single item of Equipment or component thereof, less depreciation, provided Tenant shall obtain Landlord's consent to any single item of Equipment costing in excess of \$10,000, such consent not be unreasonably withheld or delayed. If Landlord does not consent to such a repair, Tenant will not be obligated to replace such item of

Equipment and may continue to repair such item until the end of the Lease term. For the purpose of this Paragraph, Equipment shall be depreciated over a ten (10) year amortization period. Landlord shall be entitled to inspect the condition of the Demised Premises and repair any obligations that are the responsibility of the Landlord at any reasonable time.

7. TENANT'S RIGHT TO ALTER THE DEMISED PREMISES. Tenant shall be entitled to alter or make such interior non-structural additions to the Demised Premises as Tenant may determine so long as such alterations or additions are in compliance with all applicable laws. Tenant shall indemnify and save harmless Landlord from any claim for payment or lien arising out of the alterations of or additions to the Demised Premises made by Tenant, and Tenant shall bond or otherwise remove any lien filed against the Demised Premises in connection with such alterations or additions. Tenant shall also have the right to affix such appurtenances to the exterior of the Demised Premises as it may from time to time deem necessary including but not limited to transmission/receiving devices , subject to Landlord's prior written approval of such alterations or additions and Tenant's plans for same, such approval not to be unreasonably withheld or delayed.

8. BLOCKAGE AND RENT ABATEMENT. In the event that pedestrian passage to the Demised Premises or vehicular passage to the Common Area is partially obstructed for more than five (5) consecutive days Rental shall be reduced based on the proportionate reduction of any sales made from the Demised Premises, except if such obstruction is caused or necessitated by acts of Tenant. In the event that pedestrian passage to the Demised Premises or vehicular passage to the Common Area is completely obstructed, Rental shall abate until such obstruction is removed.

9. CONDEMNATION. In the event that any portion of the Demised Premises is taken by condemnation, Tenant shall be entitled to terminate the Lease and thereupon the parties shall be relieved from all further liability under the same. In the event that any portion of the Common Area or any adjacent road, other than the area outlined on the Plot Plan in green, is taken by condemnation and Tenant determines that the Demised Premises are untenable or unusable as a result of such taking, Tenant shall be entitled to terminate the Lease and thereupon the parties shall be relieved from all further liability under the same. If Tenant fails to terminate the Lease in accordance with this Paragraph, Rental shall be reduced by the proportionate amount of building area, in the case of Demised Premises, or land, in the case of Common Area, other than the area outlined in green on the Plot Plan, taken by condemnation, or the proportionate reduction of any sales made from the Demised Premises, whichever is greater. Landlord, in such an event, shall restore forthwith the premises taken or affected by the condemnation to provide the same approximate location, size and configuration of building area as well as all parking lot

light standards, parking spaces, sidewalks, driveways and vehicular access points to adjacent roadways existing prior to the condemnation. During the time period of such restoration if Tenant is not able to operate in the Demised Premises in Tenant's reasonable judgment, Rental shall abate. In the event that either of the Shopping Center pylon signs situated in the Shopping Center shown on the Plot Plan is taken by condemnation, Landlord shall restore forthwith such sign to a location in the Shopping Center reasonably satisfactory to Tenant. Nothing herein shall constitute waiver of compensation for damages by reason of a condemnation. The term "condemnation" as used in the Lease shall include all conveyances in anticipation or lieu of an actual taking. In the event that the Lease shall be terminated as provided above, all unearned Rental and other payments paid in advance shall be immediately refunded to Tenant.

Notwithstanding anything to the contrary in the Lease, in the event of a condemnation of the Demised Premises, and if in connection with such condemnation Tenant is not permitted to institute a separate suit to recover any loss occasioned by such condemnation, then Tenant shall be entitled to claim and prove in any condemnation or related proceedings brought by Landlord or the condemning authority, and to receive pursuant to such proceedings, such award as may be allowed as damages for Tenant's relocation costs, loss of business, the unamortized portion of betterments and improvements amortized over the original term of the Lease, trade fixtures and other equipment installed by Tenant and not removed.

✓ 10. CASUALTY. In the event that any portion of the Demised Premises is damaged by reason of fire, casualty or other cause, or is declared unfit or unsafe for use by any governmental authority, Landlord shall restore forthwith the Demised Premises, and Rental shall abate during the time period of such restoration in proportion to the area of the Demised Premises that is untenantable in Tenant's reasonable judgment. If the time period required to restore the Demised Premises is in excess of two hundred seventy (270) days, Tenant shall be entitled to terminate the Lease. In the event that any portion of the Common Area is damaged for any reason other than the misconduct of Tenant, its contractor or employees, Landlord shall restore forthwith same. The Rental during the time period of restoration shall be reduced based on the proportionate amount of land in the Common Area damaged thereby or the proportionate reduction of any sales made from the Demised Premises, whichever is greater. In the event that the Lease shall be terminated as provided above, all unearned Rental and other payments paid in advance shall be immediately refunded to Tenant.

✓ 11. LANDLORD'S INSURANCE OBLIGATION. Landlord shall maintain an all-risk insurance policy insuring the Demised Premises, excluding foundation and footing, and the Common Area at their full replacement value. Landlord further shall maintain general public liability insurance over the Common Area with a combined bodily injury, death and property

damage limit of \$2,000,000.00 or more per occurrence. All insurance maintained in accordance herewith shall contain a waiver of subrogation against Tenant, shall name Tenant as an additional insured by endorsement to Landlord's policy, and shall be carried by an insurer qualified to conduct business in the state in which the Demised Premises are situated and rated "A+XII" or higher by A.M. Best Company's Key Rating Guide, Property-Casualty. Prior to the date that Rental commences as provided hereunder, and thereafter upon request, Landlord shall furnish Tenant with a certificate of insurance and endorsement to Landlord's policy evidencing the type and amount of coverage set forth in this Paragraph and a provision that there will be no cancellation, reduction or non-renewal without giving Tenant thirty (30) days prior written notice thereof and a certified copy of an endorsement naming Tenant as an additional insured and stating that Landlord's insurance is primary. Notwithstanding anything contained herein to the contrary, Landlord expressly releases Tenant for any damages to the Demised Premises, the Shopping Center and the Common Area or for any injuries incurred in the Shopping Center or the Common Area, irrespective of cause, which are customarily covered by the insurance required to be maintained in accordance with this Paragraph. By way of explanation, it is the intent of the preceding sentence that Landlord's insurance will answer to all claims for personal injuries or property damage arising from incidents or occurrences in the Common Area. Tenant hereby expressly releases Landlord for any damage or injuries within the interior of the Demised Premises irrespective of cause, including but not limited to all claims for personal injury, unless caused by Landlord's breach of its obligations under the Lease or its willful misconduct.

12. LANDLORD'S AND TENANT'S RECIPROCAL INDEMNIFICATIONS.

A. Tenant shall indemnify and save harmless Landlord from all claims, losses, damages and expenses, including without limitation reasonable attorneys' fees, arising out of (i) Tenant's failure to maintain the Demised Premises in accordance with Paragraph 6C hereof, or (ii) Tenant's use or occupancy of the interior of the Demised Premises.

B. Landlord shall indemnify and save harmless Tenant from all claims, losses, damages and expenses, including without limitation reasonable attorneys' fees, arising out of Landlord's failure to maintain the Demised Premises and the Shopping Center in accordance with the Lease or any applicable laws.

13. USE OF THE DEMISED PREMISES. Subject to the provisions of this Paragraph, Tenant shall be entitled to use the Demised Premises for any lawful purpose. Nothing herein shall require Tenant to conduct a business in the Demised Premises, or to restrict or affect the time period during which it may conduct a business in the same. Tenant shall be entitled to use the sidewalks abutting the Demised Premises and portions of the Common Area for the storage

of bacsarts, the operation of vending machines and the sale of seasonal merchandise. Additionally, Tenant shall be entitled to use that portion of the Common Area outlined in yellow on the Plot Plan for the sale of seasonal merchandise and special promotions.

Tenant covenants and agrees as follows:

- (a) Tenant will comply, at its cost and expense, with all laws, rules, regulations, orders and ordinances of applicable federal, state and local governmental authorities with respect to Tenant's particular use of the Demised Premises, or any work to be performed in the Demised Premises by Tenant pursuant to the Lease, and Tenant shall secure and keep in force all permits, licenses and approvals required for Tenant's particular use of the Demised Premises;
- (b) Tenant shall not use any portion of the Demised Premises for a business or use which creates strong, unusual or offensive odors, fumes, dust or vapors except as is incidental to the retail operations conducted in the Demised Premises; is a public or private nuisance; emits noise or sounds which are objectionable due to intermittence, beat, frequency, shrillness or loudness; or creates unusual fire, explosive or other hazards;
- (c) Tenant shall not use any portion of the Demised Premises for any of the following uses: funeral parlor; flea market, government-surplus store, salvage store, or auction house; industrial manufacturing, assembly, refining, smelting, agricultural, mining, distilling or warehousing operation (except incident to a retail operation); automobile, truck, trailer or recreational-vehicle sale, leasing, display or repair facility; discotheque; skating rink; any establishment selling or exhibiting obscene materials or pornographic materials; massage parlor; so called head shop; a carnival, amusement park or circus, amusement arcade or game room except as an incidental part Tenant's business in the Demised Premises; body and fender shop; car wash; off-track betting parlor; mobile home park, trailer court, labor camp, junkyard, or stockyard (except that this provision shall not prohibit the temporary use of construction trailers during periods of construction, reconstruction, or maintenance); dumping, disposing, incineration, or reduction of garbage (exclusive of garbage compactors located in the rear of any building or refuse or recycling efforts incidental to Tenant's retail operations; central laundry, dry cleaning plant, or Laundromat; and living quarters, sleeping apartments, or lodging rooms).

Landlord also covenants and agrees that it shall not allow any portion of the Shopping Center to be used for the businesses or uses set forth in Paragraphs 13(b) and 13(c) above.

The provisions this Paragraph 13 shall apply to any assignee of this Lease and to any subtenant of the Demised Premises.

14. SUBLETTING AND ASSIGNMENT. Tenant shall be entitled to assign, mortgage or otherwise pledge the Lease, make a partial assignment of its rights under the Lease, or sublease the Demised Premises, and Landlord expressly consents to same. Tenant shall furnish Landlord notice of any such assignment, mortgage or pledge ("Mortgage") or sublease, including the name and address of any assignee, secured creditor ("Mortgagee") under a Mortgage or subtenant respectively. For purposes of the Lease, the term "Mortgagee" shall only relate to Tenant's Mortgagee.

15. CESSATION OF BUSINESS.

In the event that Tenant, for a continuous period of ninety (90) days, elects voluntarily and permanently to cease all business operations within the Demised Premises and has not sublet or licensed the Demised Premises or assigned the Lease within this period of time, then Landlord shall be entitled to terminate the Lease strictly in accordance with the terms set forth below:

a. Landlord must give to Tenant written notice of Landlord's election to terminate the Lease within sixty (60) days after all business operations within the Demised Premises have ceased for a continuous period of ninety (90) days. In the event that Landlord fails to give such notice within said sixty (60) day period, all of Landlord's rights under this Paragraph 15 thereafter shall terminate. Rental and other expenses due under the Lease shall abate during such sixty (60) day period.

b. Upon giving such written notice to Tenant, and as a condition precedent to termination, Landlord shall reimburse to Tenant fifty percent (50%) of the unamortized value of Tenant's leasehold improvements made to the Demised Premises, as reflected in Tenant's books and records (plus, if elected by Tenant and remaining in the Demised Premises, fifty percent (50%) of the unamortized value of Tenant's trade fixtures and equipment, as reflected in Tenant's books and records).

c. After receipt of Landlord's termination notice, Tenant shall have sixty (60) days occupancy of the Demised Premises, free from all Rental and other monetary obligations, within which to remove its property from the Demised Premises. After such sixty (60) day time period has elapsed, and subject to Landlord's performance of all obligations set forth herein, the Lease shall terminate, and Landlord and Tenant shall have no further obligations under the Lease.

d. Notwithstanding anything to the contrary contained herein, Landlord shall have no right to terminate the Lease if Tenant ceases business operations due to casualty, force majeure, labor disputes, strikes, product shortages or other causes outside of the reasonable control of Tenant.

e. Notwithstanding anything to the contrary contained herein, the provisions of this Paragraph 15 shall at all times be junior, subordinate and subject to a Mortgage and the rights of Mortgagee thereunder.

16. LANDLORD'S ASSIGNMENT. Landlord shall have the unrestricted right to assign this Lease and upon any such assignment and assumption by Landlord's assignee, Landlord shall automatically be released from all further liability under the Lease from and after the date of such assignment and assumption of Lease. Landlord shall furnish promptly to Tenant a copy of such assignment and assumption of Lease.

17. ADDITIONAL LANDLORD WARRANTIES AND COVENANTS OF QUIET ENJOYMENT. Landlord warrants that to the best of Landlord's actual knowledge (i) there is no lawsuit, claim, condemnation, judgment, order or ruling threatened or pending against the Shopping Center as of this date, (ii) all real estate taxes and assessments levied (and currently owed) against the Shopping Center shall be fully paid prior to any penalty or delinquency, (iii) it has the lawful right, title and authority to make the Lease, (iv) Tenant shall quietly and peacefully enjoy the Demised Premises and Common Area, together with all rights, privileges and appurtenances thereunto appertaining, free and clear of any hindrance or molestation subject to the provisions of the Lease and (v) Landlord owns fee simple title to the Shopping Center, free and clear of all liens, easements, restrictions and other encumbrances. In the event that Landlord breaches any of the warranties set forth herein, Tenant shall be entitled to terminate the Lease in addition to all remedies available at law or in equity.

18. A. TENANT'S DEFAULT. In the event that Tenant is in default of the Lease and such default continues for thirty (30) days or such longer period if such default cannot be readily cured within such time period so long as Tenant commences such cure within the thirty (30) day period and continuously and diligently prosecutes such cure to completion after its receipt of prior written notice, except for monetary defaults which notice shall be ten (10) days, Landlord shall be entitled to terminate the Lease and repossess the Demised Premises in addition to all remedies available at law or in equity, except as otherwise provided in this Paragraph 18. Notwithstanding anything contained herein to the contrary, for reasons other than the failure to pay Rental or other charges except if Tenant withholds Rental under a reasonable belief such a withholding is permitted under the Lease, Tenant shall not be deemed in default of the Lease.

unless found by a court of competent jurisdiction, or of last resort in the event of an appeal, to have breached the terms of the Lease.

B. NOTICE TO TENANT'S MORTGAGEE AND MORTGAGEE'S RIGHT TO CURE. If Tenant continues to be in default of the Lease upon expiration of the thirty (30) day (or longer) grace period provided herein(ten (10) days for monetary default), Landlord shall notify the Mortgagee of the default and same shall be entitled to cure the default within thirty (30) days from its receipt of notice. If the default cannot be cured within such time period by due diligence, Mortgagee shall have a reasonable time period within which to cure same. Notwithstanding anything contained herein to the contrary, Landlord shall not terminate the Lease by reason of Tenant's default without first serving Mortgagee written notice and allowing Mortgagee a reasonable time period within which to cure same, and to foreclose or otherwise acquire Tenant's interest in the Demised Premises. If a default by Tenant shall be cured, Mortgagee shall not be obligated to continue any foreclosure or possession proceedings which it may have instituted. Should Mortgagee or any party claiming through Mortgagee succeed to the interest of Tenant hereunder, Landlord shall recognize the party as the Tenant and shall not disturb its use and enjoyment of the Lease, provided that same cure any default by Tenant which may be satisfied by the payment of money and perform all of the obligations of Tenant set forth in the Lease which accrue thereafter.

C. TENANT'S MORTGAGEE'S RIGHT TO ENTER INTO A NEW LEASE WITH LANDLORD. In the event that prior to the expiration of the term then in effect, the Lease is terminated for any reason, including without limitation, rejection or disaffirmance in accordance with any law affecting bankruptcy or creditor's rights, Landlord shall furnish Mortgagee prior written notice and a statement of any and all sums which would have been due under the Lease but for its termination. Mortgagee within sixty (60) days thereafter shall be entitled to enter into a new lease with the Landlord upon the same terms and conditions of the Lease, including any renewal terms, for the remainder of the term which would have been in effect but for the termination of the Lease, provided that Mortgagee pay all sums under the Lease due and payable but unpaid at the time of the Lease's termination and which become due between the dates on which the Lease is terminated and the new lease becomes effective. The new lease shall have the same priority of title as the Lease. Landlord shall execute and return to Mortgagee any and all documents, in form and substance satisfactory to Mortgagee, which secure such priority of title within seven (7) days after receipt of same. Between the dates on which the Lease is terminated and the new lease becomes effective, Landlord shall keep the Demised Premises and Common Area in good repair and shall not alter same without the prior written approval of Mortgagee.

D. LANDLORD'S DUTY TO NOTIFY TENANT'S MORTGAGEE. Landlord shall serve Mortgagee a copy of all default notices under the Lease, at the address which Landlord has been furnished. Any notice to Tenant hereunder shall be ineffective unless a copy of same has been delivered to Mortgagee.

E. LANDLORD'S AND TENANTS OBLIGATION TO EXECUTE AN ESTOPPEL CERTIFICATE. Landlord and Tenant shall execute and return to each other an estoppel certificate, in the form attached hereto as Exhibit "C", confirming that the Lease is in full force and effect and free of default by either party (or stating any exceptions) within fourteen (14) days after receipt of same.

19. TENANT'S OBLIGATION TO EXECUTE A SUBORDINATION NON-DISTURBANCE AND ATTORNMENT AGREEMENT. Tenant agrees to subordinate the Lease to the lien of Landlord's first mortgage upon request of Landlord only so long as Tenant's right of quiet enjoyment under the terms and conditions of the Lease are not disturbed and Tenant receives a fully executed original of a Subordination, Non-Disturbance and Attornment Agreement in the form attached hereto as Exhibit "D" and made a part hereof. Tenant agrees to cooperate with Landlord and Landlord's lenders providing interim and permanent financing for the Shopping Center, and to enter into a Subordination, Non-Disturbance and Attornment Agreement in the form attached hereto as Exhibit "D", with such minor modifications as may be reasonably requested by Landlord's lenders; provided, that said modifications do not affect the economics of the Lease or affect Tenant's rights, remedies, obligations or liability under the Lease, and further provided that Tenant shall only be required to enter into such agreement with the holder of the first mortgage or security deed.

20. LANDLORD'S DEFAULT. In the event that Landlord is in default of the Lease, Tenant, without liability, shall be entitled to cure same and deduct the reasonable, actual cost thereof from Rental, Percentage Payments or any other sums payable by Tenant under the Lease in addition to all remedies available at law or in equity, provided that it shall furnish Landlord and any mortgagee of Landlord, the name and address of which Tenant previously has been furnished prior notice thereof, and permit same to cure the default within thirty (30) days thereafter, and further provided that Tenant shall be obligated to furnish Landlord and any mortgagee of Landlord only such notice as is reasonable and practicable (if any) under the circumstances and an opportunity to cure a default in the case of an emergency situation.

21. A. REAL ESTATE TAXES Landlord or Tenant shall petition the local taxing authority and obtain a separate real estate tax bill for the Demised Premises together with the Common Area specifically serving the Demised Premises as outlined in yellow on Exhibit "A"

attached hereto and marked "Kroger Tax Lot". If such petition is granted, in lieu of paying a prorata share of real estate taxes for the Demised Premises and Shopping Center as above provided, Tenant shall pay all real estate taxes and assessments levied against the Kroger Tax Lot. Tenant shall pay the same on or before the due date thereof, failing which Landlord may pay such real estate taxes and assessments and Tenant shall reimburse Landlord therefor within thirty (30) days after delivery of written notice from Landlord. If Tenant desires to contest real estate taxes and assessments assessed against the Kroger Tax Lot, then Tenant shall (i) give Landlord written notice thereof; (ii) post reasonable security for payment of taxes; (iii) diligently pursue its contest to completion; and (iv) in any event, promptly pay all amounts required to prevent foreclosure of a tax lien, failing which Landlord may pay the same and Tenant shall reimburse Landlord within ten (10) days of delivery of written notice from Landlord, along with a copy of the paid tax bill for the Kroger Tax Lot. In the event that the parties are not successful in having the Kroger Tax Lot separately assessed, then commencing on the Rental Commencement Date, Tenant shall reimburse Landlord for Tenant's prorata share of all of the real estate taxes and assessments levied on the Shopping Center. Tenant's prorata share shall be in the ratio that the square footage of the Demised Premises bears to the total square footage in the Shopping Center. The Landlord shall furnish Tenant copies of all tax bills as well as all computations used to calculate Tenant's prorata share of real estate taxes in addition to any other documentation reasonably requested by Tenant, and Tenant shall be entitled to audit Landlord's records for real estate taxes and assessment on the Shopping Center at any reasonable time, provided that Landlord shall be entitled to destroy its records for same after three (3) years of the assessment. Tenant shall reimburse Landlord for such expenses within thirty (30) days after its receipt of the billing and the documentation set forth above. In the event that Tenant should in good faith dispute Landlord's bill or calculation it shall notify Landlord within such thirty (30) day period of the portion thereof in dispute and shall be relieved of payment of such disputed portion until such dispute is resolved. Tenant shall be obligated to pay to Landlord its prorata share of the real estate taxes and assessments not disputed. Landlord shall pay prior to all delinquency any and all real estate taxes and assessments levied against the Shopping Center (including the Demised Premises), provided Tenant timely pays its pro rata share to Landlord. In the event that Landlord fails to pay such real estate taxes and assessments in a timely manner, Tenant shall be relieved from any liability to pay its prorata share of any penalty and interest assessed by reason of such failure provided that Tenant makes a timely payment of its proportionate share of undisputed real estate taxes and assessments to Landlord after receipt of billing, in accordance with this Paragraph. In the event of any proposed increase in the real estate taxes which Landlord intends to contest, Landlord shall notify Tenant of such proposed increase and of Landlord's intent to contest same; and Tenant shall be entitled to join in such contest at Landlord's expense and shall be entitled to require Landlord to contest any such increase. Landlord also agrees to join in any contest proceeding initiated by Tenant. In the event that Landlord fails to bill Tenant for its

prorata share of the real estate taxes within one (1) year after Landlord's receipt of a billing, Tenant shall be relieved from payment of its prorata share of such real estate taxes assessed under the billing. Any payments made by Tenant under this Paragraph shall be a non-cumulative set off against Percentage Payments.

B. COMMON AREA MAINTENANCE REIMBURSEMENT. Commencing on the date upon which Rental becomes due hereunder, Landlord shall invoice Tenant, quarterly, for Tenant's pro rata share of the costs incurred by Landlord in the maintenance and repair of the Common Area, including the backup invoices and documentation reasonably necessary to evidence the work performed and the payment made therefor, and the manner in which Tenant's pro rata share was calculated. Tenant shall reimburse Landlord for such pro rata share within thirty (30) days after its receipt of the invoice and documentation set forth above. Tenant's pro rata share shall be in the ratio that the square footage of building area in the Demised Premises (excluding the enclosed dock) bears to the total square footage of all building area in the Shopping Center. Notwithstanding the preceding sentence, Landlord shall require the tenant or owner of the Outlots to contribute its pro rata share of maintenance and repairs (including, without limitation striping) associated with the interior drives and entrances to the Shopping Center which are adjoining or in proximity to the Outlots and identified as the area outlined in blue on the Plot Plan after such tenant or owner of the Outlot opens for business. In no event shall Tenant be responsible for any portion of Landlord's costs associated with or related to: (i) office overhead, management fees, salaries, depreciation and administrative costs; (ii) replacements; (iii) expenditures which typically would be capitalized as opposed to expensed, or those which add value to the Shopping Center rather than returning the Shopping Center to its prior condition; or (iv) any single expenditure exceeding \$10,000.00 for which Landlord has not received Tenant's prior written approval.

Landlord and Tenant agree that since the parking lot lighting standards in front of the Demised Premises are to be wired and metered through Tenant's electric meter that Tenant's sole obligation in connection with payment for parking lot lighting as a Common Area maintenance expense shall be to pay the utility charges incurred in the operation of the parking lot lighting standards wired directly to Tenant's meter. Landlord assumes all other maintenance and repair obligations of these parking lot lighting standards and all other Common Area lighting standards.

Landlord acknowledges the need for Tenant to close its book on a timely basis, and hereby waives any and all rights, whether legal or equitable, in and to any reimbursement from Tenant for charges incurred unless such charges are invoiced to Tenant no later than two years after such charges are incurred by Landlord. Any payments made by Tenant under this Paragraph shall constitute a non-cumulative set off against Percentage Payments.

C. INSURANCE PREMIUM REIMBURSEMENT. Commencing on the date upon which Rental becomes due hereunder, Tenant shall reimburse Landlord for its pro rata share of Landlord's insurance premiums incurred pursuant to Paragraph 11 hereof, prorated to the Rental commencement date. Tenant's pro rata share shall be in the ratio that the square footage of building area in the Demised Premises (excluding the enclosed dock) bears to the total square footage of all building area in the Shopping Center for which Landlord has obtained insurance. Landlord shall bill Tenant within sixty (60) days of the date of Landlord's payment of premiums, which billings shall be accompanied by legible copies of the paid premium invoices and such additional information as may be necessary to calculate Tenant's pro rata share. Tenant shall pay its pro rata share of insurance premiums within thirty (30) days after receipt of paid invoices from Landlord. If Landlord fails to bill Tenant within one year of the date of Landlord's payment of a premium, Tenant's reimbursement obligation for that premium shall thereupon be extinguished.

Landlord shall use due diligence and good faith to obtain the insurance at a competitive rate and upon Tenant's request, but no more frequently than every three years, Landlord shall obtain competitive quotes from at least three insurance companies. If requested by Tenant, Landlord shall promptly furnish Tenant documentation of Landlord's efforts to obtain competitive insurance rates and copies of competitive quotes.

Tenant, for so long as its tangible net worth is in excess of One Hundred Million Dollars (\$100,000,000) or its market capitalization exceeds One Billion Dollars (\$1,000,000,000), shall have the right to elect to insure or self insure the Demised Premises Area against fire and casualty upon delivery of notice of such election to Landlord. Should Tenant make such an election, then Tenant shall not be required to reimburse Landlord for any fire and casualty premiums relating to the Demised Premises incurred pursuant to Paragraph 11 hereof. Within a reasonable time of Landlord's written request, Tenant shall deliver a certificate of insurance to Landlord and Landlord's mortgagee provided Tenant has received written notice delivered by certified mail, return receipt requested, of the mortgagee and its address. In the event of a casualty as contemplated by Paragraph 11 hereof, Tenant shall pay all insurance proceeds for the Demised Premises over to Landlord, excluding proceeds for Tenant's property, leasehold improvements and trade fixtures.

Any payments made by Tenant under this Paragraph shall be a non-cumulative set off against Percentage Payments.

22. LIMITATIONS OF LANDLORD'S LIABILITY. Except for any claim or damage arising from (a) Landlord's failure to maintain the insurance required under the Lease, (b) environmental liability under applicable laws, or (c) Landlord's willful breach of Tenant's exclusives or criminal acts, Landlord shall have no personal liability with respect to any of the provisions of the Lease. If Landlord is in default with respect to its obligations under the Lease, Tenant shall look solely to the interests of Landlord in and to the Shopping Center for satisfaction of Tenant's remedies, if any, except as expressly set forth herein. Landlord's liability under the terms of the Lease shall in no event exceed the amount of its interest in and to the Shopping Center, except as expressly set forth herein. In no event shall any partner or manager of Landlord nor any joint venture of Landlord, nor any officer, director or shareholder of Landlord or any such partner or joint venture of Landlord be personally liable with respect to any of the provisions of the Lease. Any claim, demand or cause of action which may arise on behalf of Tenant against Landlord under the Lease or otherwise relating to the Demised Premises or the Shopping Center shall be enforceable only against Landlord's right, title and interest in the Shopping Center, including all rents, profits and proceeds therefrom, and no other property of Landlord, any successor or assign of Landlord, any partner, shareholder or manager of Landlord, or any partner, shareholder or manager of any successor or assign of Landlord, shall be subject to such claim, demand or cause of action.

23. NOTICES. All notices and approvals required or permitted under the Lease shall be written and sent by certified or registered mail, return receipt requested, to Landlord at the address to which Rental is sent with a copy to Winchester Commons, c/o Fairway Investments, 2830 Cahaba Road, Birmingham, AL 35223, Attn: Mr. Guy S. Clifton and to Tenant at: The Kroger Co., 800 Ridge Lake Blvd, Memphis, TN 38120-9427, Attention: Real Estate Department, or any subsequent address which either party may designate for such purpose. Date of a notice shall be the date on which such notice is deposited in a post office of the United States Postal Service, or successor governmental agency, or upon delivery or refusal by a reputable overnight courier service (such as Airborne Express or Federal Express), receipt requested.

24. RENTAL PAYEE. Rental shall be paid by check drawn to the order of Engel Realty, Inc. and mailed to P. O. Box 187, Birmingham, AL 35201-0187, Attn: Accounting Department.

25. ENTIRE AGREEMENT. The Lease contains the entire agreement between the parties and there are no other covenants, express or implied, except as contained herein. Any statement, representation, inducement or promise made by either party or an agent of either party which is not contained herein shall be null and void.

26. WAIVER NOT IMPLIED. Any waiver of a provision set forth in the Lease by either party shall not be deemed to imply or constitute a further waiver of the same or any other provision set forth herein.

27. NON-WAIVER. In the event that any administrative, legislative or judicial body of competent jurisdiction should find that a provision set forth in the Lease is invalid, all other provisions set forth in the Lease shall remain in full force and effect and shall be unaffected by same.

28. NO MERGER. If Landlord or Tenant acquires the interest of the other in the Demised Premises, there shall be no merger of the leasehold estate into the fee simple estate in the Demised Premises.

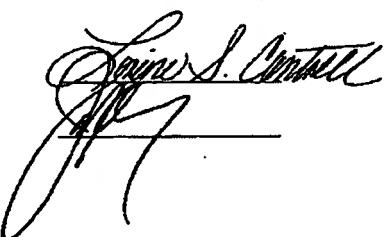
29. PARAGRAPH CAPTIONS. The captions or other headings of any paragraph or sub-paragraph of this Lease Agreement are inserted for convenience only and shall not be deemed a part of this Lease Agreement or construed as in any manner limiting or amplifying the terms and conditions of this Lease Agreement.

30. SUCCESSORS AND ASSIGNS. The provisions of the Lease shall bind and inure to the benefit of each party, and its heirs, executors, administrators, successors and assigns.

31. TERMINATION OF PRIOR GROUND LEASE AGREEMENT. The Ground Lease Agreement dated December 16, 1997, by and between Tenant and Landlord's predecessor in interest, Faison-Winchester Commons Limited Partnership, is hereby terminated and of no further force or effect. Landlord and Tenant are hereby released from any obligations heretofore accrued or to accrue under such Ground Lease Agreement.

This Lease Agreement has been executed in four (4) counterparts, each of which constitutes a complete and binding agreement.

Witnesses:



LANDLORD:
ORCHID, L.L.C.,
an Alabama limited liability company

By: James O. Rein
James O. Rein
Its Manager

TENANT:
KROGER LIMITED PARTNERSHIP I,
an Ohio limited partnership

Paula R Kirk
Donna McMiller

By: KRGP, Inc., its general partner

By: Richard L. Tillman
Richard L. Tillman
President
Delta Kroger Marketing Area

(Landlord/Corporate Acknowledgment)

STATE OF Alabama
COUNTY OF Jefferson)

This day, before me, a Notary Public of the State and County aforesaid, personally appeared James D. Rein, Manager of Orchid LLC, with whom I am personally acquainted and who upon oath acknowledged himself to be such officer of Orchid LLC, a(n) Alabama Limited Liability Company; Landlord in the foregoing Lease Agreement, and that he as such Manager, being authorized so to do, executed the instrument for the purposes therein contained by signing in the name of the corporation as such officer.

Witness my hand and official seal this 28th day of April, 1999
6-10-99
My commission expires: _____

Lorraine S. Centalli
Notary Public

(Landlord/Partnership Acknowledgment)

STATE OF _____
COUNTY OF _____

This day, before me, a Notary Public in the State and County aforesaid, personally appeared _____ of _____, with whom I am personally acquainted and who upon oath acknowledged himself to be _____ of _____, a _____ partnership, Landlord in the foregoing Lease Agreement, and that he as such _____, being authorized so to do, executed the instrument for the purposes therein contained by signing in the name of the Partnership.

Witness my hand and official seal this _____ day of _____ 19____.

Notary Public

My Commission Expires:

(Landlord/Individual Acknowledgment)

STATE OF _____
COUNTY OF _____

This day, before me, a Notary Public of the State and County aforesaid, personally appeared _____, with whom I am personally acquainted and who upon oath acknowledged himself to be the Landlord in the foregoing Lease Agreement and acknowledged the signing to be his voluntary act.

Witness my hand and official seal this _____ day of _____, 19____.

Notary Public

My commission expires:

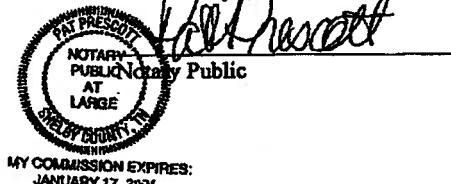
(Tenant Acknowledgment)

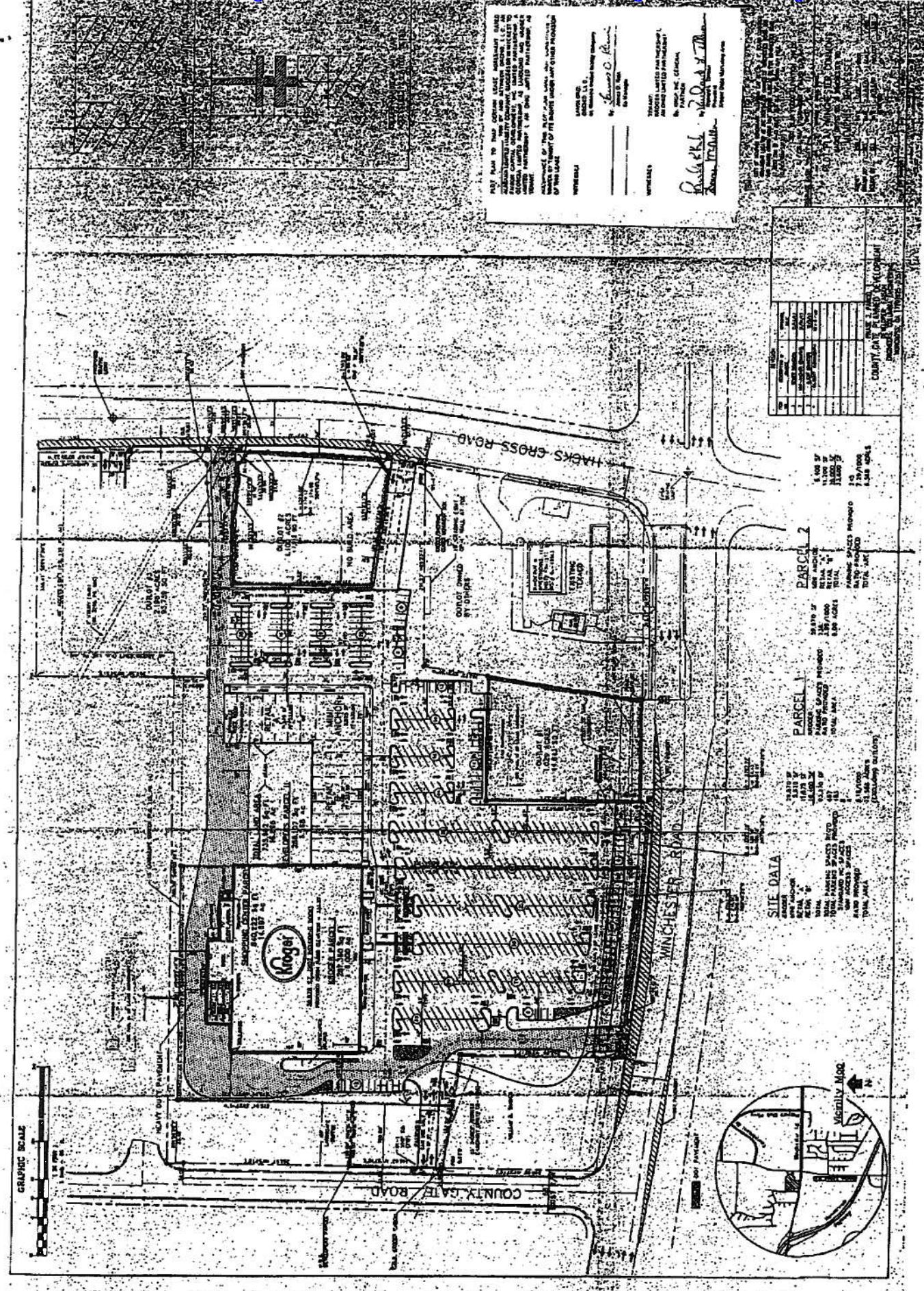
STATE OF TENNESSEE)
COUNTY OF SHELBY)

The foregoing instrument was acknowledged before me this 27 day of
April, 1998 by Richard L. Tillman, the President of the Delta
Marketing Area for KRGP, Inc., the general partner of Kroger Limited Partnership I, an Ohio
limited partnership, on behalf of the limited partnership.

IN WITNESS WHEREOF I have hereunto set my hand and official seal.

1/17/01
My Commission expires





Page 1

1

IN THE CIRCUIT COURT OF SHELBY COUNTY,
TENNESSEE FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

3

4

LILLIAN BROOKS and
5 ANTHONY L. BROOKS,

6

7 Plaintiffs,

8

9 Vs. Case No. CT-005835-08
10 TUWAYNE SHIVERS, THE
KROGER COMPANY, a Corporation
11 and INLAND WESTERN MEMPHIS
WINCHESTER, LLC,

12

13 Defendants.

14

15 THE DEPOSITION OF
16 BRIAN QUINTON MIDDLETON
17 September 29, 2009

18

19

20

21

22

23 ALPHA REPORTING CORPORATION

AMY DILLINGER, CSR, RPR

236 Adams Avenue

24 Memphis, Tennessee 38103

EXHIBIT

C

<p style="text-align: right;">Page 2</p> <p>1 The Deposition of BRIAN QUINTON 2 MIDDLETON was taken on behalf of the 3 Plaintiffs, pursuant to Notice, September 29, 4 2009, beginning at approximately 10:00 o'clock 5 a.m., in the offices of Glankler Brown, 6000 6 Poplar Avenue, Memphis, Tennessee.</p> <p>7 This deposition is taken pursuant to 8 the terms and provisions of Tennessee Rules of 9 Civil Procedure.</p> <p>10 All forms and formalities, including 11 the signature of the witness, are waived and 12 objections alone for matters of incompetency, 13 irrelevancy and immateriality of the testimony 14 are reserved to be presented and disposed of at 15 or before the hearing. Objections as to the 16 form of the question must be made at the taking 17 of the deposition.</p> <p>18 19 20 21 22 23 24</p>	<p style="text-align: right;">Page 4</p> <table border="0"> <tr><td>1</td><td>DIRECT EXAMINATION</td></tr> <tr><td></td><td>BY MR. HALE..... 5</td></tr> <tr><td>2</td><td>CROSS EXAMINATION</td></tr> <tr><td>3</td><td>BY MR. FEIGELSON..... 93</td></tr> <tr><td>4</td><td>REDIRECT EXAMINATION</td></tr> <tr><td></td><td>BY MR. HALE..... 111</td></tr> <tr><td>5</td><td></td></tr> <tr><td>6</td><td>Exhibit 1-photo..... 56</td></tr> <tr><td>7</td><td>Exhibit 2-lease agreement..... 62</td></tr> <tr><td>8</td><td>Exhibit 3-photos..... 86</td></tr> <tr><td>9</td><td>Exhibit 4-photos..... 89</td></tr> <tr><td>10</td><td>Exhibit 5-drawing..... 98</td></tr> <tr><td>11</td><td></td></tr> <tr><td>12</td><td></td></tr> <tr><td>13</td><td></td></tr> <tr><td>14</td><td></td></tr> <tr><td>15</td><td></td></tr> <tr><td>16</td><td></td></tr> <tr><td>17</td><td></td></tr> <tr><td>18</td><td></td></tr> <tr><td>19</td><td></td></tr> <tr><td>20</td><td></td></tr> <tr><td>21</td><td></td></tr> <tr><td>22</td><td></td></tr> <tr><td>23</td><td></td></tr> <tr><td>24</td><td></td></tr> </table>	1	DIRECT EXAMINATION		BY MR. HALE..... 5	2	CROSS EXAMINATION	3	BY MR. FEIGELSON..... 93	4	REDIRECT EXAMINATION		BY MR. HALE..... 111	5		6	Exhibit 1-photo..... 56	7	Exhibit 2-lease agreement..... 62	8	Exhibit 3-photos..... 86	9	Exhibit 4-photos..... 89	10	Exhibit 5-drawing..... 98	11		12		13		14		15		16		17		18		19		20		21		22		23		24	
1	DIRECT EXAMINATION																																																				
	BY MR. HALE..... 5																																																				
2	CROSS EXAMINATION																																																				
3	BY MR. FEIGELSON..... 93																																																				
4	REDIRECT EXAMINATION																																																				
	BY MR. HALE..... 111																																																				
5																																																					
6	Exhibit 1-photo..... 56																																																				
7	Exhibit 2-lease agreement..... 62																																																				
8	Exhibit 3-photos..... 86																																																				
9	Exhibit 4-photos..... 89																																																				
10	Exhibit 5-drawing..... 98																																																				
11																																																					
12																																																					
13																																																					
14																																																					
15																																																					
16																																																					
17																																																					
18																																																					
19																																																					
20																																																					
21																																																					
22																																																					
23																																																					
24																																																					
<p style="text-align: right;">Page 3</p> <p>1 APPEARANCES</p> <p>2 3 4 For the Plaintiff: 5 ROBERT B.C. HALE, ESQ. 6 Glankler Brown 7 1700 - One Commerce Square 8 Memphis, Tennessee 38103 9 525-1322</p> <p>10 11 12 For the Defendant Kroger: 13 KENNETH R. RUDSTROM, ESQ. 14 Spicer Rudstrom, LLC 15 175 Toyota Plaza 16 Suite 800 17 Memphis, Tennessee 38103 18 523-1333</p> <p>19 20 21 For the Defendant Inland Western: 22 DAVID I. FEIGELSON, ESQ. 23 Petkoff & Feigelson 24 305 Washington Avenue 25 Suite 201 26 Memphis, Tennessee 38103-1911 27 523-1050</p> <p>28 29 30 Reported by: AMY DILLINGER, CSR, RPR 31 Alpha Reporting Corporation 32 236 Adams Avenue 33 Memphis, Tennessee 38103 34 (901) 523-8974</p> <p>35 36 37 38 39 40</p>	<p style="text-align: right;">Page</p> <p>1 BRIAN QUINTON MIDDLETON 2 after having been duly sworn, was deposed and 3 testified as follows:</p> <p>4 DIRECT EXAMINATION</p> <p>5 BY MR. HALE:</p> <p>6 Q. Mr. Middleton, my name is Rob Hale and 7 you and I met for the first time just a moment 8 ago; is that correct?</p> <p>9 A. Yes.</p> <p>10 Q. Have you ever been deposed before?</p> <p>11 A. Yes.</p> <p>12 Q. And you understand how this works and 13 the process?</p> <p>14 A. Yes.</p> <p>15 Q. The ground rules are pretty simple.</p> <p>16 Please let me get my question out in its 17 entirety like you have been doing before you 18 begin your response, and if you need a break at 19 any time, tell me, and I'll be happy to take a 20 break. It's not meant to be torture, and 21 please say yes or no and give any explanation 22 you want as opposed to nodding your head or 23 saying un-unh or uh-huh, just to help the court 24 reporter?</p>																																																				

	Page 6	Page 8
1 A.	I understand.	1 Q. Just to shop?
2 Q.	Please state your full name?	2 A. Yes.
3 A.	Brian Quinton Middleton.	3 Q. Personally to shop?
4 Q.	And your home address?	4 A. Yes.
5 A.	6694 French Cove.	5 Q. You weren't there as a secret shopper
6 Q.	If I ask you a question at any time	6 or anything like that for the Kroger store?
7	that you don't understand, any part of the	7 A. No.
8	question you don't understand, will you stop me	8 Q. When you started with Kroger, what was
9	and ask me to repeat the question, please?	9 your first position?
10 A.	Yes.	10 A. Co-manager.
11 Q.	At the end of the deposition I'm	11 Q. How long were you a co-manager?
12	probably going to ask you, if I recall, did you	12 A. Three years.
13	understand all of my questions. So I want to	13 Q. Which stores did you work at?
14	make sure if you have any qualms about what I'm	14 A. I worked at Kirby and Quince, American
15	asking or don't understand what I'm asking,	15 Way; the store West Memphis, Arkansas; the
16	stop me and say repeat it or say it a different	16 store in Olive Branch, in '78, and I had some
17	way or anything you need, okay?	17 short assignments at Mendenhall and Sanderlin,
18 A.	Okay.	18 and that's it.
19 Q.	You're not on any medication today that	19 Q. So, the best you can recollect today,
20	would affect your ability to testify, are you?	20 you've worked as a co-manager in five different
21 A.	No.	21 Kroger stores?
22 Q.	Who are you employed by?	22 A. Yes.
23 A.	Kroger Company.	23 Q. How many Kroger stores are in the
24 Q.	How long have you been employed by the	24 greater Memphis area more or less?

	Page 7	Page 9
1	Kroger Company?	1 A. In the greater Memphis area, it's 36.
2 A.	Five years.	2 Q. Is there an oversight management area
3 Q.	Where is your office address?	3 that defines within the big Kroger, national
4 A.	800 Ridgelake Boulevard.	4 Kroger that defines a geographic area,
5 Q.	Has that been your office address for	5 according to Kroger?
6	the last five years?	6 A. Yes.
7 A.	It's been my office address for the	7 Q. What does Kroger call this area?
8	last year and a half.	8 A. Delta marketing area.
9 Q.	Prior to that where was your office	9 Q. How many stores are in the Delta
10	address?	10 marketing area?
11 A.	I worked in several different stores as	11 A. A hundred and ten.
12	a co-manager around the Memphis area.	12 Q. Where does it go?
13 Q.	Did you work at the store that's	13 A. Memphis, Jackson, Mississippi, Jackson,
14	involved in this matter, the store on	14 Tennessee and Paducah, Kentucky.
15	Winchester?	15 Q. How many stores are there within Kroger
16 A.	No.	16 altogether?
17 Q.	Did you ever go to that store as a	17 A. Maybe fifteen hundred.
18	Kroger employee for any reason?	18 Q. Does an individual store have a
19 A.	No.	19 particular budget keyed to that store?
20 Q.	Did you visit that store as part of the	20 A. Yes, for new stores, yes.
21	lease negotiations or anything like that?	21 Q. What about existing stores, does it
22 A.	No.	22 have a budget it's suppose to meet, for
23 Q.	Have you ever been to that store?	23 instance, with respect to employee expenses or
24 A.	Yes.	24 labor expenses?

<p style="text-align: right;">Page 10</p> <p>1 A. Yes.</p> <p>2 Q. What about a budget with respect to 3 repairs to the inside of the store?</p> <p>4 A. Yes.</p> <p>5 Q. And is there a budget with respect to 6 the repairs to the external facade of the 7 store?</p> <p>8 A. Yes.</p> <p>9 Q. Is that a separate budget line item, or 10 is it the same as the internal?</p> <p>11 A. It's the same.</p> <p>12 Q. Is there a budget for any repairs for 13 the parking lot at the stores?</p> <p>14 A. For leased or Kroger owned stores?</p> <p>15 Q. Let's talk about Kroger owned stores?</p> <p>16 A. It depends.</p> <p>17 Q. I assume what you're telling me the way 18 Kroger works some of the stores Kroger goes to 19 a builder and says, build me a store, here's my 20 spot, I own the property, here's what I want 21 you to build?</p> <p>22 A. We don't get involved with the parking 23 lot. We just focus on the store building and 24 what goes inside the store.</p>	<p style="text-align: right;">Page 12</p> <p>1 or a leased facility.</p> <p>2 Q. All right. I can -- let's talk about 3 a leased facility?</p> <p>4 A. No.</p> <p>5 Q. Okay. You understand I'm talking about 6 the address that is at issue here is 7942 7 Winchester; do you understand that?</p> <p>8 A. Yes.</p> <p>9 Q. If I say the store from now on in the 10 deposition, can we agree we're talking about 11 that particular Kroger store at 7942 12 Winchester, okay?</p> <p>13 A. Yes.</p> <p>14 Q. If I am talking about other stores, 15 I'll specifically mention them; is that okay?</p> <p>16 A. Yes.</p> <p>17 Q. With respect to the store we're talking 18 about here that's a leased facility?</p> <p>19 A. Yes.</p> <p>20 Q. If a Kroger store sees a McDonald's bag 21 out on the parking lot --</p> <p>22 A. (Interposing.) It shouldn't be out 23 there, but, no.</p> <p>24 Q. Why shouldn't it be out here?</p>
<p style="text-align: right;">Page 11</p> <p>1 Q. Does Kroger own some of the land on 2 which the store sits?</p> <p>3 A. There are some Kroger owned stores.</p> <p>4 Q. Have you ever worked at a Kroger owned 5 store?</p> <p>6 A. Kirby and Quince we own the building.</p> <p>7 Q. Who owns the parking lot at the Kirby 8 and Quince store?</p> <p>9 A. I don't know the name of the shopping 10 center owner.</p> <p>11 Q. What you're telling me though is that 12 you at the Kirby and Quince facility, while you 13 may own the building, you don't own the area 14 outside of the building?</p> <p>15 A. Exactly. Olive Branch is a Kroger 16 owned building and Utley owns the parking lot 17 and the rest of the shopping center.</p> <p>18 Q. Are Kroger employees responsible for 19 cleaning any of the area on the exterior of the 20 building as far as trash pickup?</p> <p>21 A. When you say exterior?</p> <p>22 Q. Once you go out the entrance and exit 23 doors?</p> <p>24 A. It depends if it's a Kroger owned store</p>	<p style="text-align: right;">Page 1</p> <p>1 A. Because the property owner is in charge 2 of the maintenance of the parking lot that's 3 sweeping paving, restriping the parking lot, 4 lights.</p> <p>5 Q. What about the area before you get to 6 the parking lot just outside the doors of the 7 stores, who's responsible for that store?</p> <p>8 A. Just outside of the door?</p> <p>9 Q. Yeah, where the benches are and where 10 you have plants to sell and all kind of good 11 stuff like that, who's responsible for that 12 area?</p> <p>13 A. The property owner.</p> <p>14 Q. Okay. That's true if you guys are 15 watering plants and dirt and debris falls out 16 of the plants, that's somebody else's property?</p> <p>17 A. The Kroger employee will sweep that 18 area.</p> <p>19 Q. The area we're talking about now is the 20 area right there outside door and before you 21 get to the roadway; is that correct?</p> <p>22 A. Yes.</p> <p>23 Q. That area is an area that Kroger 24 employees have some responsibility to keep</p>

<p>1 clean?</p> <p>2 A. As needed, yes.</p> <p>3 Q. And a McDonald's bag, if some person</p> <p>4 has thrown it on the ground, would a Kroger</p> <p>5 employee pick it up and throw it away?</p> <p>6 A. Yes.</p> <p>7 Q. Would you expect him to do that?</p> <p>8 A. Yes.</p> <p>9 Q. Would that be part of his job</p> <p>10 responsibilities?</p> <p>11 A. I wouldn't say that. It's just</p> <p>12 keeping the -- keeping the front of the store</p> <p>13 clean.</p> <p>14 Q. You want the store to look good for the</p> <p>15 patrons?</p> <p>16 A. Yeah, and I would pick it up if I</p> <p>17 walked up and saw that.</p> <p>18 Q. That's because you're a good person?</p> <p>19 A. Kroger employees are good people.</p> <p>20 MR. HALE: Off the record.</p> <p>21 (Off the record discussion.)</p> <p>22 BY MR. HALE:</p> <p>23 Q. All right, Mr. Middleton, let me get</p> <p>24 some background; what's your educational</p>	<p>Page 14</p> <p>1 Q. In other words I'm asking whether</p> <p>2 Kroger has somebody whose part of their</p> <p>3 responsibility would be to make sure that</p> <p>4 properties that they lease are reviewed for</p> <p>5 safety for their patrons?</p> <p>6 A. Prior to construction?</p> <p>7 Q. Prior or after, and I'm not talking</p> <p>8 about internally, but externally the roadways,</p> <p>9 the parking areas, lighting, those kind of</p> <p>10 things in the Delta area, is there a person who</p> <p>11 looks at leases and the premises even after</p> <p>12 it's leased and before it's leased to make some</p> <p>13 sort of determination for Kroger as to whether</p> <p>14 it's safe or unsafe for their patrons?</p> <p>15 A. I don't know.</p> <p>16 Q. What about in this local market here in</p> <p>17 Memphis, is there anybody here who has the</p> <p>18 responsibility for Kroger to periodically go</p> <p>19 around and check their leased premises to make</p> <p>20 sure that their landlords are doing whatever it</p> <p>21 is the lease may require the landlords to do to</p> <p>22 make sure that the premises are safe for</p> <p>23 patrons?</p> <p>24 A. No one from Kroger, because that would</p>
<p>1 background?</p> <p>2 A. I have a bachelor's degree in</p> <p>3 accounting from the LeMoyne-Owen University and</p> <p>4 a master's degree from the University of</p> <p>5 Phoenix.</p> <p>6 Q. In what?</p> <p>7 A. Business administration.</p> <p>8 Q. All of this is geared to business?</p> <p>9 A. Yes.</p> <p>10 Q. Is it fair to say you don't have an</p> <p>11 engineering degree?</p> <p>12 A. Yes.</p> <p>13 Q. And you don't claim to have any</p> <p>14 expertise in parking lot design?</p> <p>15 A. No.</p> <p>16 Q. Lighting?</p> <p>17 A. No.</p> <p>18 Q. Does Kroger employ anybody in the Delta</p> <p>19 region?</p> <p>20 A. Delta division.</p> <p>21 Q. Who has any responsibility for</p> <p>22 oversight or review of leases or leased plants</p> <p>23 as it relates to parking lots?</p> <p>24 A. No.</p>	<p>Page 15</p> <p>1 be a store employee and store employees aren't</p> <p>2 familiar with the leases and what is asked of</p> <p>3 the property owner.</p> <p>4 Q. So, in essence, nobody from Kroger side</p> <p>5 has the responsibility to make sure that the</p> <p>6 parking lots are safe for the pedestrians?</p> <p>7 A. No.</p> <p>8 Q. Do you know whether anybody at the</p> <p>9 store level and in particular let's talk about</p> <p>10 the store in question, the Winchester store,</p> <p>11 whether anybody at that store had the</p> <p>12 responsibility and duty as part of their job to</p> <p>13 periodically survey the parking lot to make</p> <p>14 sure that everything was in order?</p> <p>15 A. When you say in order?</p> <p>16 Q. Whether all of the lights are working</p> <p>17 properly, whether the painted striping on the</p> <p>18 roadway is still in good repair and visible,</p> <p>19 anybody from Kroger have that responsibility?</p> <p>20 A. No.</p> <p>21 Q. I'm assuming you're not telling me that</p> <p>22 Kroger didn't care about whether these things</p> <p>23 are done; is that correct?</p> <p>24 A. I'm not saying that. In cases where</p>

<p style="text-align: right;">Page 18</p> <p>1 it's a shopping center, the shopping center 2 owner would have someone following up on the 3 parking lot and the maintenance of the parking 4 lot. That's not done by Kroger or someone 5 inside of the store.</p> <p>6 Q. With respect to this particular store, 7 who is it that is responsible from the 8 landlord's side and in particular an 9 individual, if you know, from the landlord's 10 side to make sure that the parking lot is safe?</p> <p>11 A. I don't know the individual, but Inland 12 is the owner of the shopping center.</p> <p>13 Q. Have you ever talked to anybody at 14 Inland?</p> <p>15 A. No, we have an ASP that does a lot of 16 the property management work and I manage it 17 through her, so I never had any contact.</p> <p>18 Q. You're going to have to help me with 19 the lingo. What's an ASP?</p> <p>20 A. Admin support personnel, secretary.</p> <p>21 Q. Is that a Kroger person?</p> <p>22 A. A Kroger person in my office.</p> <p>23 Q. What's her name?</p> <p>24 A. Carol York.</p>	<p style="text-align: right;">Page 20</p> <p>1 Wendy's. That's all I know. Not that much.</p> <p>2 Q. All right. So I assume what you're 3 telling me somebody at the store recognized 4 there was a pothole out back where you have to 5 load and unload your trucks, I take it?</p> <p>6 A. It wasn't someone in the store. It was 7 the Kroger driver.</p> <p>8 Q. A Kroger employee?</p> <p>9 A. Yes.</p> <p>10 Q. Recognized there was a problem with the 11 roadway out back where you load and unload 12 trucks?</p> <p>13 A. Well, it was actually in front of the 14 loading dock.</p> <p>15 Q. And they then -- it was enough of an 16 issue for them that they reported to somebody, 17 I assume, in the store?</p> <p>18 A. Well, they called real estate directly, 19 I believe.</p> <p>20 Q. So, is it a different department that 21 the delivery people are in?</p> <p>22 A. Yes, the distribution center.</p> <p>23 Q. This distribution center employee knew 24 to make a call to you when they saw there was a</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p style="text-align: right;">Page 19</p> <p>1 Q. Ms. York, for the purpose there had 2 been any communication with Inland, Ms. York 3 would have had conversations if there were any 4 with people with Inland; is that correct?</p> <p>5 A. Yes, with the property manager.</p> <p>6 Q. Who is that?</p> <p>7 A. Maggie Dean. I don't know who it was 8 in 2007, but right now it's Maggie Dean.</p> <p>9 Q. Do you know whether any of the store 10 employees, managers or down at the store on 11 Winchester, had ever talked to Maggie Dean 12 about any issue?</p> <p>13 A. No, because they are in contact with 14 the real estate person, and we're a liaison 15 between the property and the property owner.</p> <p>16 Q. Your ASP would contact the landlord, if 17 there were any issues with the property?</p> <p>18 A. Yes.</p> <p>19 Q. Do you know of any issues that have 20 occurred at the property?</p> <p>21 A. Leaky roof.</p> <p>22 Q. Anything else?</p> <p>23 A. Potholes behind the store near the 24 loading area. There was a light out by the</p>	<p style="text-align: right;">Page 21</p> <p>1 problem with the loading and unloading area 2 where they have to drive over, and they made a 3 phone call to you and reported that problem; is 4 that right?</p> <p>5 A. Yes.</p> <p>6 Q. It made it difficult for them to get in 7 and out where they needed to be at; is that 8 correct?</p> <p>9 A. Yes.</p> <p>10 Q. And you turned around and reported it 11 to the landlord?</p> <p>12 A. Yes.</p> <p>13 Q. What about the light that was by 14 Wendy's, how did that come about?</p> <p>15 A. I believe the light is by a fuel 16 center, and it was.</p> <p>17 MR. FEIGELSON: Did you say fuel?</p> <p>18 THE WITNESS: Yes, I know it was 19 near a fuel center. I don't have any 20 background on it or who reported it.</p> <p>21 BY MR. HALE:</p> <p>22 Q. Do you believe it was somebody who 23 worked for that particular store?</p> <p>24 A. If it's near the fuel center, probably</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p style="text-align: right;">Page 22</p> <p>1 a fuel center clerk. 2 Q. And are they instructed, if they see a 3 problem like a light out, to call your office? 4 A. To let the store manager know and the 5 store manager call us. 6 Q. So, is that person in the area where 7 the gasoline is? 8 A. A kiosk. 9 Q. And you can buy gas at a discounted 10 rate if you buy enough groceries? 11 A. Yes. 12 Q. They in turn, the hierarchy is to 13 report it to the manager of the store? 14 A. Uh-huh. 15 Q. Is that yes? 16 A. I'm sorry, yes. 17 Q. Everybody does it, and the store 18 manager in turn would call your department? 19 A. Yes. 20 Q. And speak to Ms. York, it was? 21 A. Yes. 22 Q. And in turn she would call the 23 landlord? 24 A. Yes.</p>	<p style="text-align: right;">Page 24</p> <p>1 A. Yes. 2 Q. So store employees go out on the 3 parking lot to help people put the goods in the 4 parking lot? 5 A. Yes. 6 Q. And do those employees, have they been 7 told if you see a problem, make sure you tell 8 your manager? 9 A. I don't know. That's a bagger and 10 sometimes there is a breakdown in 11 communication. 12 Q. Would you expect any Kroger employee, 13 if they saw a hole or a light out in the 14 parking lot in a dark area if they saw and 15 recognized it, would you expect them to tell 16 somebody? 17 A. Yes. 18 Q. And that would work its way up to your 19 office? 20 A. Yes. 21 Q. And you would agree to the extent they 22 see something amiss or wrong in the parking lot 23 are required or should report it to their 24 higher ups in the store?</p>
<p style="text-align: right;">Page 23</p> <p>1 Q. So, I take it then the store employees, 2 whether they're in the kiosk or in the store 3 have been instructed, if you see a problem with 4 the light out or something, you need to report 5 it to somebody so it can get fixed? 6 A. Yes. 7 Q. Is that right? 8 A. Yes. 9 Q. With respect to that particular store, 10 I'm assuming that the landlord doesn't have the 11 obligation to go get the shopping carts out of 12 the parking lot, do they? 13 A. No. 14 Q. That's a Kroger responsibility, 15 correct? 16 A. Yes. 17 Q. So, periodically employees of Kroger 18 are out on the parking lot; is that right? 19 A. Uh-huh. 20 Q. Is that yes? 21 A. Yes, I'm sorry. 22 Q. And I guess once more some people want 23 help getting their groceries into the parking 24 lot; is that correct?</p>	<p style="text-align: right;">Page 25</p> <p>1 A. Yes. 2 Q. And is it fair to say that Kroger 3 employees are in and around the parking lot 4 essentially all the time the store is open? I 5 don't mean every second, but this is a pretty 6 constant activity of people going out to the 7 parking lot and delivering and getting carts 8 and bringing them back in? 9 A. Yes. 10 Q. I'm not trying to imply they're there 11 every second of every day, but this goes on all 12 day long? 13 A. Yes. 14 Q. And the cart retrieval is an all day 15 long event? 16 A. Yes. 17 Q. And the grocery help is an all day long 18 event? 19 A. Yes. 20 Q. Are managers suppose to periodically 21 inspect the parking lot area to make sure the 22 carts are being brought back timely and 23 appropriately? 24 A. Yes.</p>

<p style="text-align: right;">Page 26</p> <p>1 Q. They're suppose to look at the parking 2 lot periodically to make sure that the lights 3 are working?</p> <p>4 A. No, they're suppose to check to make 5 sure all of the bascarts are off the parking 6 lot.</p> <p>7 MR. FEIGELSON: That's what?</p> <p>8 THE WITNESS: B A S C A R T, 9 that's what we call them.</p> <p>10 MR. HALE: The standard silver 11 baskets that are there.</p> <p>12 MR. RUDSTROM: They're not silver 13 anymore. They're all plastic.</p> <p>14 BY MR. HALE:</p> <p>15 Q. But that's what you're talking about?</p> <p>16 A. Yes.</p> <p>17 Q. As it relates to the parking lot, it is 18 only people that you're aware of at this 19 particular store to make sure that the carts 20 get brought back in?</p> <p>21 A. Yes.</p> <p>22 Q. Anything else they're suppose to 23 periodically check on the parking lot?</p> <p>24 A. No.</p>	<p style="text-align: right;">Page 28</p> <p>1 Q. I assume Kroger has some sort of 2 written policy to govern what their employees 3 are suppose to do; is that correct?</p> <p>4 A. There is a check list. I'm not sure 5 it's a policy but a check list.</p> <p>6 Q. A document that's called a check list?</p> <p>7 A. Yes.</p> <p>8 Q. Is it a daily check list?</p> <p>9 A. Yes.</p> <p>10 Q. Is each store suppose to do that once a 11 day or more than once a day?</p> <p>12 A. Once a day.</p> <p>13 Q. In the store at Winchester, if they're 14 following the policy at Kroger, as you 15 understand, it would have a check list for the 16 day of December 21, 2007?</p> <p>17 A. They should.</p> <p>18 Q. I understand how the world works and 19 perhaps not every store does what they're 20 suppose to do all the time, but if they're 21 following what you understand the policy to be 22 on December 21, 2007 there is a check list on 23 Winchester?</p> <p>24 A. Yes.</p>
<p style="text-align: right;">Page 27</p> <p>1 Q. Are they suppose to periodically walk 2 the parking lot to make sure there are no 3 hazards in the parking lot?</p> <p>4 A. There is a -- the parking lot is part 5 of a store walk for the manager. It usually 6 begins when they pull up on the parking lot, 7 and if there is any potholes on the parking lot 8 as they're walking to the front of the store, 9 they're suppose to document it and report it.</p> <p>10 Q. What else are they suppose to report? 11 I assume you want them to report anything 12 that's out of the ordinary?</p> <p>13 A. Yes.</p> <p>14 Q. Anything they see that they think might 15 be dangerous?</p> <p>16 A. Yes.</p> <p>17 Q. Is there any written policy and 18 procedure at Kroger that would apply to that 19 particular store out on Winchester as it 20 relates to what they're suppose to look at or 21 see the managers, that is, when they're either 22 coming into the store or doing a periodic check 23 of the external area?</p> <p>24 A. When you say a written policy?</p>	<p style="text-align: right;">Page 2</p> <p>1 Q. The check list would include what as 2 its relates to the external side, talking about 3 the parking lot?</p> <p>4 A. Potholes, parking lot adequately 5 striped, any debris in the parking lot. I 6 believe that's it.</p> <p>7 Q. While I'm thinking about it, I don't 8 want to know anything you talked to Mr. 9 Rudstrom about. I'm not entitled to know that, 10 okay, but have you reviewed any documents in 11 preparation for your testimony today?</p> <p>12 A. When you say documents?</p> <p>13 Q. Any piece of paper, doesn't have to be 14 a formal document, have you looked at anything 15 in preparation for your deposition today other 16 than correspondence that was sent to you by 17 your lawyer?</p> <p>18 A. No.</p> <p>19 Q. Have you reviewed the lease?</p> <p>20 A. Yes.</p> <p>21 Q. Well, that's a document as far as I'm 22 concerned. That's what I'm getting at. Have 23 you reviewed anything other than the lease?</p> <p>24 A. That's it, the lease and quit claim</p>

1 deed.

2 Q. What was quit claimed?

3 A. The property. Inland wasn't always

4 the owner of the property.

5 Q. Who started out as the owner?

6 A. I don't know.

7 Q. Was it Kroger?

8 A. No.

9 Q. So, as far as you can tell or remember,

10 some third party owned the land where that

11 shopping center is now?

12 A. Yes.

13 Q. And at some point it was quit claimed

14 to Inland?

15 A. Yes.

16 Q. Did you have a lease with the previous

17 owner?

18 A. Yes, a ground lease.

19 Q. And you have a ground lease now with

20 Kroger?

21 A. It's a lease agreement with Inland.

22 Q. With Inland -- let me back up. You had

23 some sort of lease arrangement with the

24 previous owner, correct?

1 A. Yes.
2 Q. And you told me that was a ground
3 lease?
4 A. Yes.
5 Q. And you now have a lease arrangement
6 with what you believe to be the new owner
7 Inland?
8 A. Yes.
9 Q. What's the difference between the two
10 arrangements you have with Inland and the
11 previous owner?
12 A. Ground lease is when you lease just the
13 land, and we own the building, and the land is
14 the -- it's the land where the building sits
15 on. It's not a parcel, just the land where
16 the building sits, and I don't know the
17 background but we usually do that to secure a
18 good piece of property which is tied up with
19 the ground lease.
20 Q. Okay. So, and I guess typically once
21 the improvement is made on the property and the
22 store is built, does the ground lease generally
23 go away and you have a regular lease
24 arrangement?

1 A. Not all the time, but in this case the
2 ground lease was incorporated with the lease
3 agreement.

4 Q. Did you have a formal lease agreement
5 at any point with the previous owner, or has
6 the formal lease agreement always been with
7 Inland?

8 A. It's always been with Inland, I
9 believe.

10 Q. Okay.

11 MR. FEIGELSON: Can you clarify
12 that. I wasn't quite sure about the last
13 question.

14 BY MR. HALE:

15 Q. Did you understand what I was getting
16 at in the last question?

17 A. Yes.

18 MR. FEIGELSON: All right.

19 BY MR. HALE:

20 Q. You're on your own. We were talking a
21 minute ago about the check list you think the
22 store has. Are there any other, other than the
23 check list, any other documents whether it's
24 policy and procedure manual, just a Kroger

1 guide or whatever it is, that's provided from
2 higher up, corporate Kroger to the individual
3 store to guide the managers there and
4 co-managers in what they're suppose to do
5 day-to-day in operating the store?

6 A. Yes.

7 Q. Okay. What's that; is there just one
8 document?

9 A. There are several documents, sales
10 plans, inventory control.

11 Q. What else?

12 A. Inventory, a lot has changed since I've
13 been out of the stores, but to my recollection,
14 inventory, sales per day, that's about it.

15 Q. What about something with respect to
16 the appearance of the store, the cleanliness of
17 the store, are there any documents that concern
18 that?

19 A. Just a check list.

20 Q. That would be the only one?

21 A. Uh-huh.

22 Q. Is that yes?

23 A. Yes..

24 Q. And, obviously, what I'm getting at,

<p style="text-align: right;">Page 34</p> <p>1 you know where I'm coming from. I'm trying to 2 find out if there are any policies and 3 procedures, whatever Kroger might call them, 4 that affect what the store employees are 5 suppose to do as relates to keeping the 6 premises internally and externally clean, and 7 you're telling me the only documents that would 8 concern that, as far as you know, is the check 9 list?</p> <p>10 A. Yes.</p> <p>11 Q. How long is the store suppose to keep 12 the check list?</p> <p>13 A. I don't know.</p> <p>14 Q. Externally, is it Kroger's intention to 15 have all the stores look the same?</p> <p>16 A. From an exterior of our building?</p> <p>17 Q. Right.</p> <p>18 A. It just depends on the store.</p> <p>19 Q. McDonald's all look alike if you've 20 driving down the road and see a McDonald you 21 know it's a McDonald's, right?</p> <p>22 A. Uh-huh.</p> <p>23 Q. Yes?</p> <p>24 A. Yes.</p>	<p style="text-align: right;">Page 36</p> <p>1 A. Yes.</p> <p>2 Q. Do they have a set of plans that has 3 anything to do with the exterior of the store, 4 get off the building and out into the parking 5 lot, is there anything in the plans that 6 discusses parking in the parking area at all?</p> <p>7 A. No.</p> <p>8 Q. So, we found a set of plans for a new 9 Kroger store, you're telling me there wouldn't 10 be anything in there like we want so many 11 parking spaces, we want them this wide and stop 12 signs on the side of the building; would there 13 be anything in the plans like that?</p> <p>14 A. No.</p> <p>15 Q. While I'm asking about that, do you 16 know whether any of the stores have stop signs 17 either on the building or right up to the edge 18 of the roadway to stop traffic before cars 19 headed in either direction in front of the 20 stores get to the doors for the entrances and 21 exits?</p> <p>22 A. I don't know.</p> <p>23 Q. You've worked in five stores as the 24 manager; is that correct?</p>
<p style="text-align: right;">Page 35</p> <p>1 Q. Does Kroger have a look they want to 2 put on their facade, whether they can read the 3 sign or not, they already know it's Kroger?</p> <p>4 A. Yes.</p> <p>5 Q. You more or less want to make them all 6 look as much alike as they can. The idea is to 7 have them all look alike?</p> <p>8 A. Yes.</p> <p>9 Q. With respect to the area outside the 10 store, now I mean the facade, all the walls and 11 from the roadway that goes by and out to the 12 parking lot, does Kroger care what that looks 13 like?</p> <p>14 A. No, I believe the city dictates how the 15 parking lot is suppose to look. It's a city 16 ordinance, but, no.</p> <p>17 Q. If Kroger, if you're going to have a 18 new store, you have bought the piece of 19 property, found a piece of property you want 20 and you're having a new store built, does 21 Kroger have a set of plans it gives to 22 builders?</p> <p>23 A. For the store?</p> <p>24 Q. Right?</p>	<p style="text-align: right;">Page</p> <p>1 A. Uh-huh.</p> <p>2 Q. Is that yes?</p> <p>3 A. Yes.</p> <p>4 Q. I assume you've spent enough time to be 5 intimately familiar with what all five of these 6 stores looks like?</p> <p>7 A. Yes.</p> <p>8 Q. Do you know whether there were any stop 9 signs, do you understand what I mean by the 10 placement of stop signs?</p> <p>11 A. Yes.</p> <p>12 Q. Right before you get to either side of 13 the entrance or exit, correct?</p> <p>14 A. Yes.</p> <p>15 Q. Do any of the other stores you've 16 worked at have stop signs there?</p> <p>17 A. Yes.</p> <p>18 Q. How many of them?</p> <p>19 A. One that I know of, and that's the 20 store in Olive Branch.</p> <p>21 Q. Is that store newer or older than the 22 store out at Winchester?</p> <p>23 A. It's older.</p> <p>24 Q. It's an older store then?</p>

<p style="text-align: right;">Page 38</p> <p>1 A. Uh-huh. 2 Q. Is that yes? 3 A. Yes. 4 Q. Do you know whether those stop signs 5 were original to when the store was first 6 built? 7 A. I don't know. 8 Q. Do you know whether Kroger had any 9 input into the decision to put the stop signs 10 there at the Olive Branch store? 11 A. No, that's the responsibility with the 12 entity that's owns the common area or owns the 13 parking lot. 14 Q. What were the stop signs attached to? 15 A. The asphalt in the street, well, in the 16 parking lot. 17 Q. Were these signs painted on the street 18 as opposed to red octagonal signs? 19 A. No, they were in the ground. 20 Q. You mean it was a sign that was 21 actually set in the ground? 22 A. Yes. 23 Q. It was a red standard stop sign like 24 you see on the street?</p>	<p style="text-align: right;">Page 40</p> <p>1 object, but you can answer. 2 THE WITNESS: All stores don't 3 have a stop sign in front. It just depends on 4 what the property owner wants. 5 BY MR. HALE: 6 Q. Let me ask it this way. Kroger is 7 concerned about the people who come in and out 8 of the store, aren't they? 9 A. Yes. 10 Q. You want your patrons to be as safe as 11 possible when they walk in and out of your 12 store; is that correct? 13 A. Yes. 14 Q. Is there any reason why Kroger hasn't 15 asked all of its landlords to put stop signs 16 right on either side of the entrance and exit 17 doors to stop and slow traffic? 18 A. Well, Kroger -- I don't know. We 19 don't deal in real estate doesn't deal with the 20 flow of traffic of the parking lot. That's 21 something that the property owner should 22 monitor. 23 Q. Is there a reason why Kroger hasn't 24 asked the property owners to install exterior</p>
<p style="text-align: right;">Page 39</p> <p>1 A. Yes. 2 Q. But it wasn't hung on the column of the 3 building? 4 A. No. 5 Q. Or over hang or anything? 6 A. No. 7 Q. Do you know whether Kroger, whether 8 that store or above that store level had 9 anything to do with the signs being put in 10 place at the Olive Branch store? 11 A. No. 12 Q. If you were the manager of the Olive 13 Branch store and one of the signs was damaged 14 or knocked down, is that the kind of thing you 15 would have reported to the landlord? 16 A. Yes. 17 Q. Because you would want those signs to 18 be in good repair? 19 A. Yes. 20 Q. Do you think the signs like that in 21 front of store slow some of the traffic? 22 A. Yes. 23 Q. Do you think it's a good idea? 24 MR. FEIGELSON: I'm going to</p>	<p style="text-align: right;">Page 41</p> <p>1 stop signs just before the entrance and exit 2 doors on the properties where it has a Kroger 3 store and where it invites patrons to come in 4 and shop? 5 A. Can you repeat the question. 6 Q. Is there a reason why Kroger hasn't 7 asked its landlords to install stop signs just 8 before the entrance and exits doors of its 9 stores? 10 A. I don't know. 11 Q. Is there anything that, because of a 12 lease or any other reason, that would prohibit 13 Kroger from asking its landlords, in 14 particular, asking Inland to install stop signs 15 the same location we've been talking about by 16 the entrance and exit doors? 17 A. Nothing in the lease that would 18 prohibit us from asking. 19 Q. As far as you know, has anybody from 20 your department ever asked Inland to do 21 anything other than replace a light and fix a 22 pothole as it relates to the property out at 23 Winchester at the store we're talking about? 24 A. Can you repeat the question.</p>

<p style="text-align: right;">Page 42</p> <p>1 Q. I'm trying to find out, so we're on the 2 same page, I just want to know what all Kroger 3 has asked Inland to do as it relates to the 4 parking area or any area outside the building. 5 You told me earlier about a pothole out back 6 and told me about a light up by the gas kiosk. 7 Do you recall at any time in your department, 8 and your department is the one that deals with 9 Inland?</p> <p>10 A. Yes.</p> <p>11 Q. And the store shouldn't do that; it 12 should go through you?</p> <p>13 A. Yes.</p> <p>14 Q. And has your department asked Inland to 15 do anything as it relates to the exterior of 16 the building, and I don't mean the facade, but 17 the area from the pavement on, other than two 18 things you told me about to fix the pothole and 19 fix the light out by the kiosk?</p> <p>20 A. I don't recall.</p> <p>21 Q. Do you keep records in your department 22 when requests are made of Inland to do 23 something?</p> <p>24 A. We do keep a maintenance log.</p>	<p style="text-align: right;">Page 44</p> <p>1 manager at that time and if they don't have 2 it --</p> <p>3 Q. (Interposing.) That check list wouldn't 4 come to your department?</p> <p>5 A. No.</p> <p>6 Q. But you know if you hadn't been a 7 manager and had been in the leasing department 8 the whole time, you wouldn't know about it?</p> <p>9 A. Exactly.</p> <p>10 Q. If that exists, it's at the store 11 still?</p> <p>12 A. Yes.</p> <p>13 Q. And you don't know of any reason why 14 they have to send them off to corporate or 15 anything like that?</p> <p>16 A. No.</p> <p>17 Q. Before coming today, did you review the 18 maintenance log as it relates to that store?</p> <p>19 A. Yes.</p> <p>20 Q. Is that why you remember the pothole 21 and the light?</p> <p>22 A. Yes.</p> <p>23 Q. Would you have recalled that otherwise?</p> <p>24 A. Yes, and the roof leak.</p>
<p style="text-align: right;">Page 43</p> <p>1 Q. Okay. Does the maintenance log 2 include fixing the pothole and fixing the pipe 3 by the kiosk?</p> <p>4 A. Yes.</p> <p>5 Q. Do you have a maintenance log that 6 relates to this store that goes back to 7 December of 2007?</p> <p>8 A. No, I do not.</p> <p>9 Q. Has it been destroyed?</p> <p>10 A. No.</p> <p>11 MR. RUDSTROM: I think he 12 misunderstood.</p> <p>13 BY MR. HALE:</p> <p>14 Q. That's fine. Is there a document back 15 at your office that you could get your hands 16 on, that would be a maintenance log that goes 17 back to December, '07, for this store?</p> <p>18 A. Yes.</p> <p>19 Q. Do you have any objection to producing 20 that?</p> <p>21 A. No.</p> <p>22 Q. Or the check list for that matter?</p> <p>23 A. I don't know about the check list.</p> <p>24 That doesn't go through me. That's up to the</p>	<p style="text-align: right;">Page 4</p> <p>1 Q. Okay. I understand the roof leak. 2 That will get your attention?</p> <p>3 A. Yes.</p> <p>4 Q. You have looked at the log and you 5 looked at the log as it relates to back in 6 December, '07, the maintenance log?</p> <p>7 A. Yes.</p> <p>8 Q. And you didn't find anything in that 9 maintenance log where Kroger requested anything 10 of Inland as relates to the parking lot other 11 than what you have told me as it relates other 12 than what you told me, the pothole and the 13 light?</p> <p>14 A. That's what I remember, yes.</p> <p>15 Q. Is it fair to say that when you 16 reviewed the maintenance log, you never saw 17 anything in there where Kroger requested any 18 improvements to any of the striping or the 19 design of the parking lot area?</p> <p>20 A. No.</p> <p>21 Q. How long have you been -- has Kroger 22 been in that facility where they were leasing 23 from Inland; do you know how long that's been 24 going on?</p>

<p style="text-align: right;">Page 46</p> <p>1 A. Leasing from Inland, I think Inland 2 took -- I think Inland took the property in 3 2003 or 2004.</p> <p>4 Q. Since that time, has there been any 5 painting done, that you're aware of, of the 6 striping whether crosswalks, line dividers or 7 anything like that in the area -- on the 8 roadway directly in front of the store?</p> <p>9 A. I don't know.</p> <p>10 Q. Has Kroger since that period of time 11 requested any painting of the striping or 12 crosswalk or anything else of the area directly 13 in front of the store from Inland?</p> <p>14 A. I don't know.</p> <p>15 Q. Would that be in the maintenance log, 16 you believe, if it had been requested?</p> <p>17 A. Yes.</p> <p>18 Q. That's where that store should go if 19 things are working like they should, if 20 somebody at Kroger had in fact requested that 21 of Inland?</p> <p>22 A. Yes.</p> <p>23 Q. That's where it would be as far as you 24 know and no other place?</p>	<p style="text-align: right;">Page 48</p> <p>1 A. Yes.</p> <p>2 Q. This is the area I'm focused on. It's 3 the only area I care about. I understand there 4 are striping in the parking lot for lanes to 5 parking, but I'm not asking about that. With 6 respect to the area in the roadway, did the 7 other five Krogers you worked at have 8 crosswalks for the patrons to cross it?</p> <p>9 A. I don't remember.</p> <p>10 Q. What about speed bumps, did any of the 11 other Krogers you worked at have speed bumps in 12 or around the same area?</p> <p>13 A. Yes.</p> <p>14 Q. How many of them had speed bumps?</p> <p>15 A. I believe two of them.</p> <p>16 Q. Which ones?</p> <p>17 A. Olive Branch and Sanderlin.</p> <p>18 Q. Do you have your own perception or idea 19 why someone would put speed bumps at such a 20 place by the doors at those two Krogers?</p> <p>21 A. Slow traffic down.</p> <p>22 Q. Do you believe that makes it safer for 23 the patrons to come in and out?</p> <p>24 A. My opinion or Kroger's opinion?</p>
<p style="text-align: right;">Page 47</p> <p>1 A. Yes.</p> <p>2 Q. I asked you earlier what you looked at, 3 and you didn't tell me about the maintenance 4 log. You probably didn't remember. Have you 5 looked at anything else?</p> <p>6 A. That's it.</p> <p>7 Q. Now, these other five Kroger stores 8 you've worked at and we determined at least one 9 has a stop signs; is that right?</p> <p>10 A. Uh-huh.</p> <p>11 Q. Yes?</p> <p>12 A. Yes.</p> <p>13 Q. Do these other stores have painted 14 crosswalks in the area where you go in and out 15 of the store; are we on the same page, at some 16 point parking ends and there is a roadway; is 17 that correct?</p> <p>18 A. Yes.</p> <p>19 Q. And traffic goes both directions, one 20 lane each way; is that correct?</p> <p>21 A. Yes.</p> <p>22 Q. And once you cross the roadway, you're 23 in the facade area and maybe an overhang and 24 you're close to the front doors, correct?</p>	<p style="text-align: right;">Page 49</p> <p>1 Q. Well, take Kroger's opinion?</p> <p>2 A. Yes.</p> <p>3 Q. What about yellow cross hatching all 4 through that area, bright yellow paint, any of 5 the stores where you were a manager or the 6 co-manager at have that kind of paint?</p> <p>7 A. I don't remember.</p> <p>8 Q. Do you know what I'm talking about?</p> <p>9 A. Yes.</p> <p>10 Q. When is the last time you were 11 physically on the premises out at the 12 Winchester store?</p> <p>13 A. Maybe beginning January or February, 14 2008.</p> <p>15 Q. Did you go out there because of this 16 accident?</p> <p>17 A. No.</p> <p>18 Q. Were you there just shopping?</p> <p>19 A. I was there shopping, and I was also 20 looking at the bank space.</p> <p>21 Q. The bank space?</p> <p>22 A. Yes.</p> <p>23 Q. Is that space within the store?</p> <p>24 A. Yes, within the store.</p>

<p style="text-align: right;">Page 50</p> <p>1 Q. Sort of a kiosk? 2 A. It's not a kiosk. It's an actual 3 place. 4 Q. Is that leased to the bank? 5 A. Yes. 6 Q. Why were you looking at that? 7 A. They were coming out, and just to see 8 what we can do with it next. 9 Q. Whether you can put another bank in 10 there or take over and use it yourself? 11 A. Yes. 12 Q. Is that the store you normally shop at? 13 A. No. 14 Q. Were you aware of this accident when 15 you went out there at that time? 16 A. No. 17 Q. Have you ever gone out there to sort of 18 look at the scene itself where the accident 19 occurred for the purposes of familiarizing 20 yourself of what it looks like? 21 A. No. 22 Q. Have you seen any pictures showing or 23 depicting the area near where Ms. Brooks was 24 injured?</p>	<p style="text-align: right;">Page 52</p> <p>1 tell you I took that picture a couple months 2 after the accident and I know they all look a 3 lot alike. Can you make that out to be the 4 Kroger out at Winchester? 5 A. I guess. 6 Q. Let me show you another picture; does 7 that help you at all? 8 A. No. I think it is though. 9 Q. I'm telling you it is, but don't take 10 my word, if one of those pictures helps you? 11 A. Yes. 12 Q. You have three pictures in front of 13 you. Assuming I'm not lying to you and these 14 were taken at the Kroger out at Winchester, you 15 don't have any reason to dispute that, do you? 16 A. No. 17 Q. When looking at these pictures, do you 18 see a stop sign? 19 A. No. 20 Q. Do you see a speed bump? 21 A. No. 22 Q. Do you see a crosswalk? 23 A. No. 24 Q. Do you see any other traffic control</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p style="text-align: right;">Page 51</p> <p>1 A. No. 2 Q. Do you know whether that store has a 3 crosswalk? 4 A. I don't know. 5 Q. Do you know whether that store has 6 speed bumps? 7 A. I think it has speed bumps. 8 Q. How close to the front door do you 9 think those speed bumps might be? 10 A. I don't know. 11 Q. Do you know when the speed bumps were 12 put there? 13 A. No. 14 Q. Did Kroger have anything to do with 15 requesting the speed bumps or having them put 16 there? 17 A. I don't know. 18 Q. What about stop signs, does it have 19 stop signs? 20 A. I don't know. 21 Q. Crosshatching we were talking about, do 22 you know whether that's on the ground? 23 A. I don't know. 24 Q. Let me show you a picture, and I'll</p>	<p style="text-align: right;">Page 51</p> <p>1 information as it relates to pedestrians, cross 2 hatching or anything else? 3 A. No. 4 Q. Do you have any reason to believe 5 that's not the way the Kroger looked on 6 December 21st, '07, of course with the 7 exception that it was dark, because it was at 8 night, but do you have any reason to believe 9 that this isn't the way the Kroger looked on 10 December 21, 2007, particularly the parking 11 lot? 12 A. No. 13 Q. Since Ms. Brooks was injured in the 14 parking lot, have you made any requests of 15 Inland with regard to the striping on the 16 parking lot or anything else? 17 A. I don't know. 18 Q. If you were the manager of the store 19 where this parking lot is, and you were aware 20 of the way this looks, would you have made any 21 request of Inland to do something to mark the 22 area for your patrons? 23 A. Yes. 24 Q. What would you have asked?</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p style="text-align: right;">Page 54</p> <p>1 A. For some crosswalks to be installed. 2 That's my personal opinion. 3 Q. That's all I can ask. By the way, 4 did Kroger have anything to do with putting 5 shrubbery in the parking lot? 6 A. No. 7 Q. That would be Inland's responsibility? 8 A. Yes. 9 Q. Did the other stores have shrubberies 10 close to the roadway? 11 A. I don't remember. Whatever the city 12 asked of the owner, that's what they put. 13 Q. I guess some municipalities are harder 14 on the owner about what they got to do? 15 A. Yes. 16 Q. Like Bartlett is pretty tough on you 17 and certain areas require more? 18 A. Yes. 19 Q. Do you personally think it's a good 20 idea to have shrubberies up near the edge of 21 the roadway where the patrons are crossing from 22 the roadway to the parking area and stepping 23 out into the roadway? 24 MR. RUDSTROM: I'm going to</p>	<p style="text-align: right;">Page 56</p> <p>1 think these in any way present a hazard to the 2 patrons coming to and from the store? 3 A. No. 4 MR. FEIGELSON: Can you tell us 5 when you took those. 6 BY MR. HALE: 7 Q. Eventually. I'm not trying to hide it. 8 I just don't remember. I can tell you it was 9 about four or five days after I talked to Ms. 10 Brooks the first time, but it would have been 11 my guess three or four months after the 12 accident. That is my shoulder. I was very 13 tall and I have gotten older and shrunk. 14 MR. HALE: Let's mark that as 15 Exhibit 1 collectively. 16 (Whereupon, Exhibit 1 was marked as an 17 exhibit to the deposition of the witness and 18 can be found among the deposition exhibits 19 attached hereto.) 20 BY MR. HALE: 21 Q. Did you review the discovery responses, 22 and by the way, these have to be notarized and 23 sworn to by somebody and it was Lisa Phillips; 24 do you know who Ms. Phillips is?</p>
<p style="text-align: right;">Page 55</p> <p>1 object, and I think you're getting in the area 2 of expert opinion on this, and I'll let him 3 answer. 4 BY MR. HALE: 5 Q. So, you were concerned about the people 6 coming in and out of the store? 7 A. Yes. 8 Q. And you want your patrons to be as safe 9 as they can? 10 A. Yes. 11 Q. And being a store manager you kept your 12 eyes out for things that you thought might be a 13 hazards for patrons coming in and out of the 14 store? 15 A. I wouldn't call this a hazard. 16 Q. I willing ask you that later, but you 17 would look and if you saw something that you 18 thought was potentially a hazard, would you 19 think about it and say, look, I need to tell 20 somebody to do something about it if you saw 21 something? 22 A. Yes. 23 Q. Now I'm asking about the shrubberies. 24 With the store manager's experience, do you</p>	<p style="text-align: right;">Page 57</p> <p>1 A. Yes. 2 Q. She's risk management? 3 A. Yes. 4 Q. Did you have anything to do with the 5 preparation of these interrogatories or any 6 request for production of documents? 7 A. No. 8 Q. This is the first time you ever saw it? 9 A. Yes. 10 Q. I'll tell you the documents that were 11 produced. I was given a copy of a statement 12 that was taken from a witness, Mr. Vogel; have 13 you ever seen or reviewed that? 14 A. No. 15 Q. Have you ever talked to Mr. Vogel? 16 A. No. 17 Q. Is it in your job responsibilities to 18 do something like that? 19 A. No. 20 Q. I was given a lease. Does this appear 21 to be the lease between Kroger and Inland? 22 A. Yes. 23 Q. And you said you reviewed that, right? 24 A. Uh-huh.</p>

<p style="text-align: right;">Page 58</p> <p>1 Q. Yes? 2 A. Yes. 3 Q. I was also given what appears to be a 4 schematic of the store and the parking lot, do 5 you know of any other documents? You've told 6 me about the check list and the maintenance 7 log. Do you know of any other documents that 8 would impact in any way on this case as far as 9 you know? 10 A. No. 11 Q. With respect to the lease arrangements 12 are there any other documents, other than the 13 ones in front of you, that would control any 14 aspect of the lease, any addenda or riders or 15 things like that, that I don't have? 16 A. No, but there is a lease modification, 17 but that's just for us to add our fuel center. 18 Q. So I assume that facility didn't have a 19 fuel center originally? 20 A. No. 21 Q. And then later you decided to put one 22 in? 23 A. Yes. 24 Q. And the lease was modified so you could</p>	<p style="text-align: right;">Page 60</p> <p>1 stop signs and things like that, does Kroger 2 have an employee who is sort of a managerial 3 employee who is over safety for the stores? 4 A. I don't know. 5 Q. No one in your department would have 6 that responsibility; is that correct? 7 A. No. 8 Q. And you don't know whether then there 9 is somebody whose sort of sole responsibility 10 is to make sure the stores themselves are safe 11 and in working order? 12 A. No. 13 Q. Is there somebody that Kroger has to 14 make sure there is not any theft from the 15 store? 16 A. Yes, that's risk management. 17 Q. Risk management oversees to make sure 18 you're not having an excess amount of goods 19 walk out without being paid for? 20 A. Yes. 21 Q. But that's not a safety person that 22 you're aware of? 23 A. For the store? 24 Q. Not necessarily just one store. It</p>
<p style="text-align: right;">Page 59</p> <p>1 take some property up for that portion on 2 Winchester? 3 A. Yes. 4 Q. Have you ever been on the premises of 5 that store at night? 6 A. No. 7 Q. Do the managers of the particular 8 stores, and let's ask about this store in 9 question, do the managers of the store on 10 Winchester have an obligation to periodically 11 check during the nighttime and see whether 12 there is adequate lighting in the parking lot? 13 A. Yes. 14 Q. Is there a document that's created in 15 any way; is that part of the check list or 16 anything? 17 A. No. 18 Q. But it would be your sense, having been 19 a store manager or now in management at Kroger, 20 that's something you would do periodically to 21 check to make sure there is adequate lighting 22 in the parking lot? 23 A. Yes. 24 Q. Those things we talked about earlier,</p>	<p style="text-align: right;">Page 61</p> <p>1 could be somebody that's an area person, a 2 district person? 3 A. Someone in risk management. 4 Q. Do you know who that would be? 5 A. I think it's Lisa. 6 Q. If there is a person in risk management 7 that has the responsibility to sure that the 8 stores are being operated as safely as 9 possible, it's Lisa? 10 A. Yes. 11 Q. What's her last name? 12 A. Phillips. 13 Q. Do you know whether she had inspected 14 this particular store around the time Ms. 15 Brooks was injured? 16 A. I don't know. 17 Q. Have you and Ms. Phillips talked about 18 this incident? 19 A. She made me aware that she needed me to 20 speak on the lease aspects. 21 Q. But you and she haven't talked about 22 what happened? 23 A. She told me that a customer was hit by 24 a car in the parking lot.</p>

<p style="text-align: right;">Page 62</p> <p>1 Q. Is that the extent of your knowledge of 2 what happened?</p> <p>3 A. Yes.</p> <p>4 Q. I'm tearing the discovery response 5 apart so I can show you the lease. You told me 6 there is an addendum or rider that relates to 7 the gas service station area. Do you believe, 8 other than that document, that this is a 9 complete agreement between Kroger and Inland?</p> <p>10 A. Yes.</p> <p>11 Q. You're unaware of any other documents 12 that concerns or touches upon or even mentions 13 who has what obligation for either the common 14 areas out there or, in particular, the area 15 right in front of your store?</p> <p>16 A. No other documents outside of this?</p> <p>17 Q. That's right?</p> <p>18 A. No.</p> <p>19 MR. HALE: Let's make that 20 Exhibit 2. 21 (Whereupon, Exhibit 2 was marked as an 22 exhibit to the deposition of the witness and 23 can be found among the deposition exhibits 24 attached hereto.)</p>	<p style="text-align: right;">Page 64</p> <p>1 general, do those kind of things go through the 2 real estate department? If a store wants to 3 make an improvement, does that go through your 4 department?</p> <p>5 A. Yes.</p> <p>6 Q. And you seek information from potential 7 contractors and try to get the best bid you can 8 to try to get the work done?</p> <p>9 MR. FEIGELSON: Do you need to 10 take a break?</p> <p>11 BY MR. HALE:</p> <p>12 Q. If you need a break, just say so?</p> <p>13 A. I'm fine. (Off the record discussion.) 14 (Whereupon, the court reporter 15 read back a portion of the record.) 16 BY MR. HALE: 17 Q. We can conclude is it your department 18 that would go out and solicit information from 19 the potential contractor?</p> <p>20 A. No.</p> <p>21 Q. Does the store manager do that?</p> <p>22 A. No.</p> <p>23 Q. There is another department?</p>
<p style="text-align: right;">Page 63</p> <p>1 BY MR. HALE:</p> <p>2 Q. Mr. Middleton, does Kroger require its 3 managerial or store employees to fill out any 4 sort of accident report for someone who is 5 injured?</p> <p>6 A. Yes.</p> <p>7 Q. Do you know whether there is an 8 accident report as relates to what happened to 9 Ms. Brooks?</p> <p>10 A. I don't know.</p> <p>11 Q. As a store manager or having been a 12 store manager, would you expect there to be 13 one?</p> <p>14 A. Should be.</p> <p>15 Q. And you weren't given one to review for 16 purposes of this deposition, were you?</p> <p>17 A. No.</p> <p>18 Q. As part of your responsibilities in the 19 real estate department, do you have anything to 20 do with sort of covers improvements and things 21 like that estimating costs and things like 22 that?</p> <p>23 A. For this store or --</p> <p>24 Q. For any particular store, I mean in</p>	<p style="text-align: right;">Page 65</p> <p>1 A. Regional construction does that.</p> <p>2 Q. And is that sort of above or below or 3 sideways from you?</p> <p>4 A. Sideways.</p> <p>5 Q. So as soon as the decision is made that 6 something might be done, you guys kick it out 7 to somebody else to get it done?</p> <p>8 A. Yes, pass the baton.</p> <p>9 Q. Do you review any of the information 10 that they get?</p> <p>11 A. No.</p> <p>12 Q. Do you know how expensive it would be 13 to paint a crosswalk in front of a store?</p> <p>14 A. No.</p> <p>15 Q. Would you, from your own personal 16 knowledge, would you think it's really 17 expensive to paint a crosswalk?</p> <p>18 MR. FEIGELSON: Objection.</p> <p>19 BY MR. HALE:</p> <p>20 Q. You can answer?</p> <p>21 A. Maybe a couple thousand.</p> <p>22 Q. What about stop signs, installing stop 23 signs, do you think that's an expensive item?</p> <p>24 MR. FEIGELSON: Same objection.</p>

<p style="text-align: right;">Page 66</p> <p>1 THE WITNESS: Maybe a couple 2 thousand, I don't know. 3 BY MR. HALE: 4 Q. Speed bumps. Do you think those are 5 expensive items? 6 MR. FEIGELSON: Same objection. 7 BY MR. HALE: 8 Q. Do you know? 9 A. No. 10 Q. As far as you know, has Kroger ever 11 explored the cost of these kind of things? 12 A. No. 13 Q. Would that be in your department? 14 A. No. 15 Q. Do you know whether the lease would 16 allow you to make improvements to the parking 17 lot such as adding a parking space if Kroger 18 wanted to do it? 19 A. Would it allow us to add it ourselves? 20 Q. Is there anything in that lease that 21 would prohibit Kroger from painting a crosswalk 22 in front of the store? 23 A. Yes. 24 Q. What portion of the lease would</p>	<p style="text-align: right;">Page 68</p> <p>1 Q. Is that your job? 2 A. Yes. 3 Q. Is it your job to know what these 4 leases say? 5 A. To an extent. 6 Q. Is it your job to know what these 7 leases make or don't make Kroger do when they 8 enter into it? 9 A. Can you repeat the last question. 10 Q. I assume you review these leases? 11 A. Yes. 12 Q. And you want to make sure these leases 13 are fair to Kroger? 14 A. Well, if it's already signed and it's 15 not fair to Kroger, it's out of my hands. 16 Q. Do you -- let's say it hasn't been 17 signed and part of your review is to make sure 18 it's fair to Kroger? 19 A. The deal points. 20 Q. Also, it's part of your responsibility 21 to do what the lease says between you and the 22 landlord? 23 A. Yes. 24 Q. You are aware what the language of the</p>
<p style="text-align: right;">Page 67</p> <p>1 prohibit Kroger from doing that? 2 A. I believe it's the responsibility 3 section of the tenant. We are not responsible 4 for that crosswalk. We're not going to paint 5 it. 6 Q. I understand that there is an issue of 7 who's responsible. I get that. Let's say 8 Kroger said in the interest of the safety of 9 our patrons we believe a crosswalk should be 10 there, okay, and that was just the thought in 11 process Kroger has, is there anything in the 12 lease that says you can't do that as opposed to 13 it isn't necessarily our responsibility to do 14 that; do you see what I'm saying? 15 A. To do it on our own? 16 Q. That's right, to do it on your own 17 nickel? 18 MR. FEIGELSON: I want to note an 19 objection to the extent that the question asks 20 for a legal conclusion. 21 BY MR. HALE: 22 Q. You work with these leases all the 23 time? 24 A. Yes.</p>	<p style="text-align: right;">Page 69</p> <p>1 lease required, and you can understand the 2 language about who has to do what? 3 A. Yes. 4 Q. That's all I'm getting at? 5 A. Okay. 6 Q. In this particular -- what's for this 7 particular store is there anything in that 8 lease that says Kroger may not make an 9 improvement to the parking lot such as adding a 10 crosswalk? 11 A. No. 12 Q. I understand that it may be Kroger's 13 position and it may not be, but it may be 14 Kroger's position, that it's somebody else, the 15 landlord's obligation, but that's not what I'm 16 asking. I'm trying to find out what Kroger 17 could do if they wanted to. If Kroger 18 decided to add a crosswalk in that parking lot 19 in that roadway, what you're telling me is if 20 they wanted to foot the nickel out on 21 Winchester, is what you're telling me they 22 could have done that? 23 A. It could have happened. 24 Q. Nothing in the lease says they couldn't</p>

<p>1 is what I'm getting at?</p> <p>2 A. Yes.</p> <p>3 Q. And if I ask you the same questions</p> <p>4 about putting a speed bump, a stop sign or</p> <p>5 cross hatches or anything else like that, I</p> <p>6 assume you're going to give me the same answer,</p> <p>7 they could have; is that right?</p> <p>8 A. Yes, but Kroger wouldn't take that</p> <p>9 stance for the common area, because it's not</p> <p>10 our responsibility to maintain that common</p> <p>11 area. Once we get to altering that common</p> <p>12 area, we become liable, and that's getting</p> <p>13 outside the lease agreement.</p> <p>14 Q. In what way do you become liable?</p> <p>15 MR. RUDSTROM: I instruct the</p> <p>16 witness not to answer. This man is not</p> <p>17 qualified to answer those questions.</p> <p>18 MR. HALE: He's the one that told</p> <p>19 me. I didn't ask the question to elicit that</p> <p>20 response.</p> <p>21 MR. RUDSTROM: And I understand</p> <p>22 that but you and I know he doesn't know what it</p> <p>23 means. He's not an expert in that field.</p> <p>24 MR. HALE: I can ask him what do</p>	<p>Page 70</p> <p>1 install speed bumps because they're a hazard</p> <p>2 because people trip over them. I meant if we</p> <p>3 install speed bumps and there was an incident</p> <p>4 on the parking lot, Kroger would -- it would</p> <p>5 be Kroger's -- it would be on Kroger.</p> <p>6 Q. I got you. What about if you --</p> <p>7 instead we're talking about crosshatching,</p> <p>8 crosswalks or a stop sign, particularly as it</p> <p>9 relates to the lease, do you see any problems</p> <p>10 for Kroger if they did that, if they installed</p> <p>11 on their own or had somebody else install at</p> <p>12 their expense, any crosshatching or stop signs,</p> <p>13 do you see any similar problem?</p> <p>14 MR. RUDSTROM: I object to the</p> <p>15 question, but if you're asking legal</p> <p>16 ramifications.</p> <p>17 BY MR. HALE:</p> <p>18 Q. I understand. You said you don't like</p> <p>19 speed bumps because people might trip over</p> <p>20 them. Do you see any similar issues if there</p> <p>21 is a painted crosswalk?</p> <p>22 A. No.</p> <p>23 Q. Do you see any problems at all like</p> <p>24 that, as relates to a crosswalk, concerns for</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>1 you mean when he says liable, and you're going</p> <p>2 to instruct him not to answer?</p> <p>3 MR. RUDSTROM: Yes, as far as the</p> <p>4 legal conclusion, legal definitions, legal</p> <p>5 conclusion, yes I'm going to instruct him not</p> <p>6 to answer.</p> <p>7 MR. HALE: Including his</p> <p>8 understanding whether it's legal or not.</p> <p>9 MR. RUDSTROM: That's correct, he</p> <p>10 has used a legal term. You're asking, I</p> <p>11 suppose if you can couch the question as to</p> <p>12 what you mean by that term.</p> <p>13 MR. HALE: That's all I want to</p> <p>14 know.</p> <p>15 MR. RUDSTROM: Once you get into</p> <p>16 the legal definition which is where I know</p> <p>17 where you're going to, I have to instruct him</p> <p>18 not to answer.</p> <p>19 BY MR. HALE:</p> <p>20 Q. What did you mean when you said you</p> <p>21 might have liability or would be liable if you</p> <p>22 made a modification to the parking lot?</p> <p>23 A. I meant if we, Kroger, installs speed</p> <p>24 bumps and, first of all, Kroger wouldn't</p>	<p>Page 71</p> <p>1 your patrons about negotiating over the</p> <p>2 crosswalks?</p> <p>3 A. No.</p> <p>4 Q. Cross hatching, any concerns for the</p> <p>5 patrons?</p> <p>6 A. No.</p> <p>7 Q. What about stop signs, any concerns for</p> <p>8 your patrons?</p> <p>9 A. No.</p> <p>10 Q. Okay, that's what I was getting at.</p> <p>11 Are you aware of any Kroger facility store in</p> <p>12 the area or any store that you have any</p> <p>13 oversight over where an election has been made</p> <p>14 to make an improvement on Kroger's nickel for</p> <p>15 putting in a crosswalk?</p> <p>16 A. No.</p> <p>17 Q. Are you aware of any store location</p> <p>18 where Kroger has requested of the landlord to</p> <p>19 put in a crosswalk?</p> <p>20 A. No.</p> <p>21 Q. Or crosshatching?</p> <p>22 A. I don't recall.</p> <p>23 Q. Or stop sign?</p> <p>24 A. I don't recall.</p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>1 Q. Is there a way to try to find out 2 better than your recollection, is there a 3 document that you can go look at to see whether 4 Kroger has ever once asked any of its landlords 5 anywhere, hey, we want you to put in a 6 crosswalk or a stop sign or a speed bump, if 7 you would do that or crosshatching, is there 8 any way to find that out?</p> <p>9 A. I don't know.</p> <p>10 Q. The area from -- look at Exhibit 1. 11 I'm assuming that your store facility and your 12 sidewalk extends further toward you. As you 13 look at this picture, the Kroger store is 14 longer?</p> <p>15 A. I believe so, yes.</p> <p>16 Q. And, also, you can see it pretty well, 17 but as you come up the picture toward me, it 18 goes pretty far down there; is that correct?</p> <p>19 A. Yes.</p> <p>20 Q. It's a reasonably big box in the 21 parking lot; is it not?</p> <p>22 A. Yes.</p> <p>23 Q. In this strip center is it the largest 24 structure?</p>	<p>Page 74</p> <p>1 was negotiated?</p> <p>2 A. No.</p> <p>3 Q. In general the leases, that Kroger has 4 with its landlords, are they negotiated 5 between the Kroger and landlords?</p> <p>6 A. Yes.</p> <p>7 Q. The terms are fought over?</p> <p>8 A. Yes.</p> <p>9 Q. And eventually y'all come to terms and 10 the lease is signed?</p> <p>11 A. Yes.</p> <p>12 Q. Does each individual Kroger store have 13 a budget that's key to that particular 14 location?</p> <p>15 A. Can you define a budget.</p> <p>16 Q. Well, I assume at the beginning of the 17 year or whenever it is your fiscal year 18 something is sent out to the store that says 19 this is what we expect your opening cost to be, 20 and you need to try to meet this operating 21 cost?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. I don't expect you to, and I 24 expect you to tell me I don't know, do you have</p>
<p>1 A. I think so.</p> <p>2 Q. I don't think there is a Best Buy, so 3 Kroger is probably the biggest thing in the 4 shopping center; is that fair?</p> <p>5 A. Yes.</p> <p>6 Q. The area of the roadway, say 20 feet 7 either side of the front door and the entrance 8 and exit doors, are we on the same page?</p> <p>9 A. Yes.</p> <p>10 Q. Is it fair to say that the vast 11 majority of the people that would be traversing 12 that area are shoppers for Kroger?</p> <p>13 A. Yes.</p> <p>14 Q. And if you were going to that parking 15 lot and you were going to shop at any store 16 other than Kroger, you wouldn't be parking in 17 front of the Kroger store?</p> <p>18 A. Yes.</p> <p>19 Q. It makes more sense to be parking down 20 in front of the store that you would be going 21 to?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. The lease that's Exhibit 1 24 were you in the leasing department when that</p>	<p>Page 75</p> <p>1 any idea what the operating budget would have 2 included on December 21st, '07 for this store?</p> <p>3 A. I don't know.</p> <p>4 Q. Having been a store manager, do you 5 have a ballpark for what the operating cost for 6 a store like that would be for a year?</p> <p>7 A. Maybe, and when you say operation cost, 8 I mean employees on location; is that what 9 you're getting at?</p> <p>10 Q. That's fine. What I want you to 11 exclude is the cost of the goods that are 12 flowing in there. Obviously you buy those from 13 vendors and that's huge. I don't care about 14 that, but running the store, what does the cost 15 to the store, absent the goods that you're 16 going to sell?</p> <p>17 A. Five hundred thousand a year.</p> <p>18 Q. Your office has never done any sort of 19 study or requested one from another department 20 about the cost of any improvements to a parking 21 lot, has it?</p> <p>22 A. No.</p> <p>23 Q. Is it fair to say that the store out on 24 Winchester -- obviously Kroger has to operate</p>

<p style="text-align: right;">Page 78</p> <p>1 through the humans that work in the store, so 2 is it fair to say that the people who work at 3 the Kroger store out on Winchester have 4 superior knowledge of the grounds around the 5 store than the occasional customer would have?</p> <p>6 A. I would assume so.</p> <p>7 Q. They're there all the time, are they 8 not?</p> <p>9 A. Yes.</p> <p>10 Q. And part of their responsibilities is 11 to make sure that the place is safe, correct?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. And the superior knowledge 14 would go to things such as lighting and whether 15 or not there are things such as crosswalks, 16 correct?</p> <p>17 A. I wouldn't say the crosswalks, because 18 I wouldn't add crosswalks. Lighting is 19 something more visible.</p> <p>20 Q. Well, who's more likely to know that 21 there is or isn't a crosswalk in front of the 22 store, the manager who works there five days a 23 week or the patron who comes there periodically 24 to buy groceries?</p>	<p style="text-align: right;">Page 80</p> <p>1 Q. There are no photos, that you're aware 2 of, that depict the accident area?</p> <p>3 A. No.</p> <p>4 Q. What about statements from any 5 witnesses, do you know of any? I showed you 6 one a minute ago. Do you know of any other, 7 other than Mr. Vogel that is attached to the 8 discovery?</p> <p>9 A. No.</p> <p>10 Q. What or who is Kevin Morgan; do you 11 know him?</p> <p>12 A. He was one -- he used to be one of the 13 managers there.</p> <p>14 Q. Is he still with Kroger?</p> <p>15 A. I don't think so.</p> <p>16 Q. What about Michael Pointer?</p> <p>17 A. He's one of the managers there as well.</p> <p>18 Q. Is he still with Kroger?</p> <p>19 A. I think so.</p> <p>20 Q. Do you know how to reach Kevin Morgan?</p> <p>21 A. No.</p> <p>22 Q. Would Kroger have information on his 23 last known address?</p> <p>24 A. Probably.</p>
<p style="text-align: right;">Page 79</p> <p>1 A. Both.</p> <p>2 Q. Who would you expect to have the better 3 knowledge?</p> <p>4 A. The manager.</p> <p>5 Q. Because they're there more often?</p> <p>6 A. Yes.</p> <p>7 Q. And that's their job, correct?</p> <p>8 A. Yes.</p> <p>9 Q. And if I ask you about crosshatching or 10 things like that, you would give me the same 11 response, wouldn't you?</p> <p>12 A. Yes.</p> <p>13 Q. You probably won't know any of this, so 14 let's try to knock this out. Mr. Rudstrom has 15 been kind enough to provide me a video of a 16 surveillance camera out front, and he's given 17 me that, but are you aware of any other 18 evidence, that might be photo or video evidence 19 of the parking lot area where Ms. Brooks had 20 her accident?</p> <p>21 A. No.</p> <p>22 Q. You are unaware of any photos; is that 23 correct?</p> <p>24 A. No.</p>	<p style="text-align: right;">Page 81</p> <p>1 Q. Do you know when he left Kroger?</p> <p>2 A. No.</p> <p>3 Q. Do you know why he left Kroger?</p> <p>4 A. No.</p> <p>5 Q. Would you know him if you saw him?</p> <p>6 A. Yes.</p> <p>7 Q. So you knew him reasonably well?</p> <p>8 A. I see him around.</p> <p>9 Q. Do you know how long he was with 10 Kroger?</p> <p>11 A. No.</p> <p>12 Q. Are you aware of any other incidents in 13 the parking lot involving pedestrians and 14 vehicles at the store out there on Winchester?</p> <p>15 A. No.</p> <p>16 Q. Is there any reason why -- are you in 17 the loop for that kind of thing any way?</p> <p>18 A. No.</p> <p>19 Q. So you wouldn't expect to know if there 20 was any other incident?</p> <p>21 A. Yes.</p> <p>22 Q. And there is also a Ms. Brown at that 23 facility; does that ring a bell?</p> <p>24 A. No.</p>

<p style="text-align: right;">Page 82</p> <p>1 Q. I'll spell the first name Yoshamira, 2 Y O S H A M I R A, Brown? 3 A. No. 4 Q. Do you know what Mr. Pointer may or may 5 not know about what happened to Ms. Brooks; do 6 you know what he would know? 7 A. Would I know? 8 Q. Do you know what he knows or doesn't 9 know about this accident? 10 A. No. 11 Q. And to make it clear, I asked Kroger 12 who knows about this accident, and those are 13 names I got back, and I am trying to find out 14 if you know what they know? 15 A. No. 16 Q. Is there a form for patrons to fill out 17 if they have a complaint about a store? 18 A. There is a customer comments. 19 Q. Are those kept? 20 A. I don't know. 21 Q. Are those customer comments reviewed by 22 some sort of employee of Kroger? 23 A. The manager. 24 Q. Are they taken seriously?</p>	<p style="text-align: right;">Page 84</p> <p>1 entrance door. 2 Q. And the exit door I take it? 3 A. Yes. 4 Q. But they're not the same, are they? 5 A. No. 6 Q. They're reasonably close? 7 A. They're next to each other. 8 Q. But they're big sliding doors, right? 9 A. Yes. 10 Q. Estimate, if you would, how wide that 11 area is, if you can? 12 A. I can't. I would say maybe 16 feet 13 wide. 14 Q. And is the area around either side of 15 that, which you would regard as the general 16 approach area to the store? 17 A. Yes, there is a walkway. 18 Q. In other words you would expect your 19 store patrons wouldn't always park necessarily 20 dead center of the doors; is that correct? 21 A. No. 22 Q. Some people would come to somewhat of 23 an angle to get to the front doors; is that 24 correct?</p>
<p style="text-align: right;">Page 83</p> <p>1 A. Yes. 2 Q. But those aren't the kind of thing that 3 would make their way to your department, are 4 they? 5 A. No. 6 Q. Do you know if they go to some higher 7 level after the manager looks at them? 8 A. I don't know. 9 Q. When you were a manager, did you review 10 the customer comments? 11 A. Yes. 12 Q. When you were at other stores, did you 13 have customer comments regarding the parking 14 lot including the crosswalk areas? 15 A. No. 16 Q. When you're trying to define the 17 approach to the store, what area do you 18 consider to be the approach to your store, if 19 you understand what I'm trying to get at? 20 A. The path someone would take coming up 21 to the store. 22 Q. That's part of it. Use the path, 23 that's the best way? 24 A. This area right here in front of the</p>	<p style="text-align: right;">Page 85</p> <p>1 A. Yes. 2 Q. That whole area in front there, as you 3 approach the door, you consider that to be the 4 approach to your store and you expect those 5 people to be your patrons? 6 A. Yes. 7 Q. Do you have those pictures here? 8 MR. RUDSTROM: Yes. 9 MR. HALE: May I look at them. 10 MR. RUDSTROM: The witness has 11 never seen them, and we'll go off the record. 12 (Off the record discussion.) 13 BY MR. HALE: 14 Q. Mr. Middleton, I have in front of you 15 five photographs that Mr. Rudstrom was kind 16 enough to bring to us, and actually they're 17 four photographs. Do they at least appear to 18 be the Kroger store we've been discussing? 19 A. Yes. 20 Q. And although I recognize that the 21 quality of these reproductions aren't great, 22 does it appear that they were taken on January 23 9th, '08? 24 A. Uh-huh.</p>

<p style="text-align: right;">Page 86</p> <p>1 Q. And that's 20 days from December 21st, 2 '07? 3 A. Yeah. 4 Q. A couple weeks or so after when Ms. 5 Brooks was injured; is that fair? 6 A. Yes. 7 Q. When looking at these, do you see a 8 crosswalk? 9 A. No. 10 Q. Do you see a stop sign? 11 A. No. 12 Q. Speed bumps? 13 A. No. 14 Q. Or crosshatching out into the area of 15 the walkway? 16 A. No. 17 MR. HALE: Let's make these the 18 next collective exhibit which would be three. 19 (Whereupon, Exhibit 3 was marked as an 20 exhibit to the deposition of the witness and 21 can be found among the deposition exhibits 22 attached hereto.) 23 BY MR. HALE: 24 Q. Mr. Middleton, I have handed you</p>	<p style="text-align: right;">Page 88</p> <p>1 Q. If her injury happened to the December 2 21st, '07? 3 A. Yes. 4 Q. In these photographs do you see a 5 crosswalk? 6 A. No. 7 Q. A stop sign? 8 A. No. 9 Q. Speed bump? 10 A. No. 11 Q. Crosshatching in the roadway? 12 A. No. 13 Q. Now, assuming that Mr. Pointer, the 14 manager or co-manager of one of these Kroger 15 stores is correct, he has marked on this 16 picture a spot by an asterisk where apparently 17 he believes anyway Ms. Brooks was lying; does 18 that appear to be what he's written there? 19 A. Yes. 20 Q. Assuming that's in fact where the 21 accident occurred, and seeing where the front 22 doors are, is it fair to say that she was in 23 the area of the approach to the store? 24 A. Approach or leaving the store, yes.</p>
<p style="text-align: right;">Page 87</p> <p>1 another photograph that Mr. Rudstrom was kind 2 enough to provide us today. Does that appear 3 to be the same Kroger store we've been talking 4 about out there on Winchester? 5 A. Yes. 6 Q. In particular you see what appears to 7 be a signature of Michael Pointer; is that 8 correct? 9 A. Yes. 10 Q. He's currently the Kroger manager or 11 co-manager? 12 A. I think so. 13 Q. You knew at one time he was? 14 A. Yes. 15 Q. And looks like this was dated 12-26-07; 16 is that correct? 17 A. Yes. 18 Q. We may have to ask Mr. Pointer to be 19 certain, but does it appear to you that's 20 probably the day he took those photographs? 21 A. Yes. 22 Q. That's less than a week after Ms. 23 Brooks' incident? 24 A. Yes.</p>	<p style="text-align: right;">Page 89</p> <p>1 Q. Either way she was in the area? 2 A. Yes. 3 MR. HALE: Let's make that the 4 next exhibit. 5 (Whereupon, Exhibit 4 was marked as an 6 exhibit to the deposition of the witness and 7 can be found among the deposition exhibits 8 attached hereto.) 9 BY MR. HALE: 10 Q. Collective Exhibit 4, three and four, 11 are these photographs that you have looked at, 12 they don't depict anything different than what 13 you saw when you went to the store in '08; is 14 that correct, as far as the crosswalk hatching 15 and all of that stuff? 16 A. Yeah. 17 Q. You believe what you would have seen, 18 when you walked out there, is similar to what 19 is in these pictures that Mr. Pointer took? 20 A. Yes. 21 Q. You don't know of any statements that 22 were given by anybody other than the one I 23 showed you today, which you haven't read, of 24 Mr. Vogel; you don't know of any other</p>

<p style="text-align: right;">Page 90</p> <p>1 statements that anybody gave about this 2 accident, do you?</p> <p>3 A. No.</p> <p>4 Q. And do you know of anybody who was a 5 witness to what happened out there?</p> <p>6 A. No.</p> <p>7 Q. Have you entered into a lease for a new 8 Kroger facility since Ms. Brooks was injured 9 out there in December, 2007, at the Kroger 10 store on Winchester?</p> <p>11 A. No.</p> <p>12 Q. Do you have any new stores in your area 13 of responsibility since then?</p> <p>14 A. No.</p> <p>15 Q. Or any lease renewals?</p> <p>16 A. Lease renewals are automatic.</p> <p>17 Q. And I don't mean just that store?</p> <p>18 A. I understand.</p> <p>19 Q. Who at the Kroger is responsible for, 20 if there is somebody, keeping up with sort of 21 crime issues in and around their store?</p> <p>22 A. Risk management.</p> <p>23 Q. Would that, again, be the lady we 24 discussed earlier?</p>	<p style="text-align: right;">Page 92</p> <p>1 Q. I'm not saying they did or didn't, I'm 2 just asking if you know whether anybody did?</p> <p>3 A. I done know.</p> <p>4 Q. No one has related to you a 5 conversation that a Kroger employee might have 6 had with Ms. Brooks?</p> <p>7 A. No.</p> <p>8 Q. Or for that reason the driver of the 9 pickup truck that hit Ms. Brooks?</p> <p>10 A. No.</p> <p>11 Q. Is there any other document, that you 12 know about, that could in any way touch on the 13 occurrence that occurred out there or Kroger's 14 obligation or Kroger's regular pattern and 15 practice of dealing with the parking lot?</p> <p>16 A. No.</p> <p>17 Q. Have we talked about every document 18 that you are aware of?</p> <p>19 A. Yes.</p> <p>20 Q. Is there anything we have left out, 21 that you know of?</p> <p>22 A. No.</p> <p>23 Q. Have you understood all of the 24 questions?</p>
<p style="text-align: right;">Page 91</p> <p>1 A. I don't know.</p> <p>2 Q. Is that her department any way?</p> <p>3 A. Yes.</p> <p>4 Q. Do you know whether this store out on 5 Winchester has similar or less or greater crime 6 problem than any other Kroger store?</p> <p>7 A. I don't know.</p> <p>8 Q. What about the parking lot in general, 9 just from your knowledge of the area of town, 10 do you know whether that parking lot has a 11 crime issue?</p> <p>12 A. No.</p> <p>13 Q. You just don't know?</p> <p>14 A. I don't know.</p> <p>15 Q. You don't know whether that store has 16 been sued by anybody else for any sort of 17 injuries in the parking lot?</p> <p>18 A. No.</p> <p>19 Q. That's just not your area of expertise 20 at Kroger?</p> <p>21 A. No, it's not.</p> <p>22 Q. Do you know whether anybody from Kroger 23 ever talked to Ms. Brooks, my client?</p> <p>24 A. No. I don't know.</p>	<p style="text-align: right;">Page 93</p> <p>1 A. Yes.</p> <p>2 Q. Do you have any qualms about any of the 3 answers that you have given me, and are you 4 comfortable with the answers you have given and 5 told me?</p> <p>6 A. Yes.</p> <p>7 MR. HALE: That's all I have.</p> <p>8 CROSS EXAMINATION</p> <p>9 BY MR. FEIGELSON:</p> <p>10 Q. My name is Dave Feigelson, and we met 11 for the first time this morning. I represent 12 one of the defendants an entity known as Inland 13 Western Memphis Winchester LLC, and during the 14 course of Mr. Hale's questioning both you and 15 he referred to an entity by the name of Inland 16 without further specification. When you 17 referred to Inland in answering Mr. Hale's 18 questions, were you referring to the entity 19 known as Inland Western Memphis Winchester LLC?</p> <p>20 A. Yes.</p> <p>21 Q. And in fact – who is it that you 22 understand Inland Western Memphis Winchester, 23 LLC to be?</p> <p>24 A. The shopping center owner.</p>

<p>1 Q. Unless I specify otherwise, I'll 2 continue the same thought when I refer to 3 Inland Western Memphis LLC, all right? 4 A. Yes. 5 Q. You mentioned, during the course of 6 your testimony, if there is a repair or 7 maintenance issue or improvement issue to a 8 piece of real estate where a Kroger store is 9 located, where Kroger does not own the real 10 estate outside of the store itself, that the 11 usual way of making the landlord aware of any 12 improvements or maintenance or repairs that 13 need to be made to that property it will flow 14 from the store, the individual store to your 15 office to Inland, correct? 16 A. Yes. 17 Q. Did your office deal with the -- to 18 your knowledge, how many store locations does 19 Kroger lease from Inland currently? 20 A. I think just this one location in this 21 division. 22 Q. To your knowledge has your office 23 communicated with any other entity concerning 24 maintenance, repair or improvement issues to</p>	<p>Page 94</p> <p>1 office ever notified Inland Western Memphis 2 Winchester of any defective or dangerous 3 conditions, other than the conditions you 4 mentioned to Mr. Hale earlier, that would 5 concern the safety of pedestrians or patrons in 6 this parking lot? 7 A. I don't know. 8 Q. You're not aware of any others, other 9 than the ones you mentioned to Mr. Hale? 10 A. I'm not aware. 11 Q. And the same question that Mr. Hale was 12 asking in terms of the speed bumps? 13 A. I don't know. 14 Q. Traffic conditions? 15 A. I don't know. 16 Q. Lighting, other than the one light you 17 already mentioned? 18 A. I don't know. 19 Q. Bushes or hedges? 20 A. I don't know. 21 Q. Signage? 22 A. I don't know. 23 Q. And parking lot marking like striping 24 or painting?</p>
<p>1 this property other than the entity we've been 2 referring to as Inland? 3 A. No. 4 MR. RUDSTROM: Do I assume you to 5 mean since Inland has had possession of the 6 property? 7 BY MR. FEIGELSON: 8 Q. Since Inland has become the owner of 9 the property? 10 A. No. 11 Q. Has Kroger, and based on the answer to 12 my question, your office ever notified Inland 13 Western Memphis Winchester LLC of any defective 14 or dangerous conditions in the parking lot at 15 this store, and I know you mentioned the light 16 by the Wendy's and mentioned the pothole in the 17 back and the roof, but I'm talking in the 18 parking lot at this store that concerns the 19 safety of pedestrians or patrons for this 20 store? 21 A. Can you repeat that. 22 Q. I'll try. Concerning this store that 23 we've been talking about today, where this 24 incident occurred on 12-21-07, has Kroger, your</p>	<p>Page 95</p> <p>1 A. I don't know. 2 Q. And crosswalks? 3 A. I don't know. 4 Q. I just need to know that you don't 5 know. On Kroger's answers to the 6 interrogatories and request for production of 7 documents, there was an attachment. I want 8 to show you a drawing of what we understand to 9 be the Kroger store and the shopping center and 10 the parking lot between County Gate Road and 11 Hacks Cross Road and fronting Winchester Road; 12 do you recognize that to be a drawing for this 13 store that we talked about? 14 A. Yes. 15 Q. The light near Wendy's and the fuel 16 center, can you point on there on this drawing 17 where the fuel center is? 18 A. I think it's in this area. 19 Q. Would you draw a box or a mark 20 indicating where you think the fuel center for 21 this shopping center is, the Kroger fuel 22 center? 23 A. Right here. 24 Q. Okay, if you will just put your name on</p>

<p>1 here. So, the fuel center, other than what 2 you have marked, the fuel center is not 3 depicted on this drawing as it was presented to 4 you, right? 5 A. No. 6 MR. FEIGELSON: If we could mark 7 that as Exhibit 5. 8 (Whereupon, Exhibit 5 was marked as an 9 exhibit to the deposition of the witness and 10 can be found among the deposition exhibits 11 attached hereto.) 12 BY MR. FEIGELSON: 13 Q. Are you familiar with an entity by the 14 name of Inland U.S. Management LLC? 15 A. I think so. 16 Q. How are you familiar with that name? 17 A. Is that the property management side of 18 Inland? 19 Q. I can't answer? 20 A. I think it's the property management 21 side of Inland. 22 Q. To your knowledge has your office ever 23 communicated with Inland U.S. Management U.S.C. 24 about this property?</p>	<p style="text-align: right;">Page 98</p> <p>1 from the time they arrive to when they get out 2 of their car? 3 A. Yes. 4 Q. Do they have a special area where they 5 park or whatever is available? 6 A. I think so, yes. 7 Q. At this location? 8 A. Yes, yes. 9 Q. Can you show us on what's been 10 identified as Exhibit 5 where the store 11 managers are supposed to park? 12 A. I believe it's here in this area. 13 Q. You're pointing to the west of the 14 Kroger store, correct? 15 A. Yes. 16 Q. If you could make that a little more 17 clear on there? 18 A. (Indicating). 19 Q. All right: You've drawn a rectangle 20 there to the west of the store, and do they 21 perform this store walk inspection for the 22 entire parking lot or just wherever they walk 23 from where they park to entering the store? 24 A. I don't know.</p>
<p>1 A. I don't know. 2 Q. Other than from Kroger employees at 3 their store, do you know if your office has 4 ever received complaints from any customers or 5 visitors about this store? 6 A. No. 7 Q. To your knowledge has there ever been a 8 pedestrian vehicle accident in the parking lot 9 at this store while Kroger was a tenant? 10 A. I don't know. 11 Q. You mentioned during your testimony 12 answering Mr. Hale's questions that the store 13 managers, and I can't remember if it was Kroger 14 in general or this store in particular, that 15 the store managers perform what you termed a 16 store walk? 17 A. Yes. 18 Q. Can you explain a little bit more what 19 a store walk is for a manager? 20 A. The check list looking at every item in 21 the check list and checking if it's okay or 22 needs attention. 23 Q. And you said they perform the store 24 walk. I don't know if I got the words right,</p>	<p style="text-align: right;">Page 99</p> <p>1 Q. Do they perform the store walk on 2 arrival or when they are leaving also? 3 A. Upon arrival. 4 Q. Only on arrival? 5 A. Only on arrival. 6 Q. Do you know how many managerial shifts 7 there would have been at this store December 8 21, 2007, in other words, is it eight hours, 9 eight to four, four to 12 or whatever it might 10 be? 11 A. Two, eight to six and twelve to ten or 12 one to eleven. 13 Q. Eight to six and 12 to -- 14 A. (Interposing.) Ten. 15 Q. So they overlap somewhat? 16 A. Yes, yes. 17 Q. About six hours? 18 A. Yes. 19 Q. So, from what you're telling us one 20 begins at eight a.m. and one begins at noon, 21 and a manager would not arrive at nighttime 22 after the sun went down; is that correct? 23 A. No. 24 Q. Am I correct?</p>

	Page 102		Page 104
1 A. Yes.		1 Q. Have you ever met her?	
2 Q. No Kroger store manager would perform a		2 A. No.	
3 store walk after dark?		3 Q. Did Ms. York make written memoranda or	
4 A. No.		4 notes about her communications with Inland?	
5 Q. I'm correct?		5 A. It depends on what it pertains to.	
6 A. Yes, you're correct.		6 Q. All right. On what occasions would	
7 Q. You mentioned that the last time you		7 she make written notes or memoranda concerning	
8 were at this particular Kroger location was in		8 her communications with Inland?	
9 the spring of '08, correct?		9 A. Maintenance issues.	
10 A. January or February, 2008.		10 Q. All right. Have you ever reviewed	
11 Q. Prior to January February '08, how		11 those notes or memoranda?	
12 often did you visit this particular store?		12 A. For this store?	
13 A. Not often.		13 Q. Yes.	
14 Q. Less than ten times?		14 A. Yes.	
15 A. Yes, less than two times.		15 Q. Is that part of your routine practice	
16 Q. As in one?		16 once a week or once a month for you to review	
17 A. Yes, once maybe.		17 memoranda, or does she cc you copies that you	
18 Q. Do you recall when that was?		18 see on a regular basis?	
19 A. No.		19 A. No.	
20 Q. You had mentioned that you shopped		20 Q. How is it that you would come to review	
21 there before?		21 her written notes and memoranda?	
22 A. Yeah, I shopped there before because I		22 A. If it's an ongoing issue, ongoing	
23 was in that area.		23 maintenance issue.	
24 Q. Those are the visits I'm referring to,		24 Q. So, for example, if Ms. York were to	

	Page 103		Page 105
1 not part of your duties as Kroger's real estate		1 call Ms. Dean and say we need X done at this	
2 person, but in terms of how often you visited		2 parking lot and Ms. Dean says, okay, we'll do	
3 this person to shop other than that January		3 it and a month later it's not done, it would	
4 February '08 visit?		4 come to your attention?	
5 A. I would say maybe two other times		5 A. Yes.	
6 outside of that one time.		6 Q. Did you review any notes or memoranda,	
7 Q. All right. Do you recall when they		7 in whatever form, from Ms. York in preparing	
8 were?		8 for your deposition today?	
9 A. No.		9 A. I did look at the maintenance log.	
10 Q. How long before the January, '08, visit		10 Q. Is that what you were referring to when	
11 was your last visit if you recall?		11 you were talking to Mr. Hale?	
12 A. Maybe a year.		12 A. Yes.	
13 Q. You don't live in that area?		13 Q. Is that it?	
14 A. No.		14 A. Yes.	
15 Q. I believe you answered Mr. Hale, you've		15 Q. Where is your office located?	
16 never been to this location at night, correct?		16 A. 800 Ridgelake Boulevard.	
17 A. Correct.		17 Q. Here in Memphis?	
18 Q. Do you know who Ms. York communicates		18 A. Yes.	
19 with when she communicates with Inland Western		19 Q. And Ms. York is physically in your	
20 Memphis Winchester LLC?		20 office?	
21 A. Maggie Dean.		21 A. Yes.	
22 Q. Have you ever communicated with Maggie		22 Q. And that maintenance log is going to	
23 Dean about this particular location?		23 have the lights out by Wendy's in it?	
24 A. No.		24 A. Yes.	

<p style="text-align: right;">Page 106</p> <p>1 Q. Do you know what time period that 2 covers? 3 A. I believe it started in 2005 up until 4 the present date. 5 Q. 2005 to date? 6 A. Yes. 7 Q. When Mr. Hale was asking you about stop 8 signs and such, and if Kroger -- there was a 9 whole discussion about whether or not Kroger 10 could, regardless of what the lease says, go 11 ahead and put a stop sign or crosswalk in, do 12 you remember that discussion? 13 A. Yes. 14 Q. I'm not using the right words, and I 15 apologize if I'm repeating myself, but to your 16 knowledge your office has never asked Inland 17 Western Memphis Winchester LLC to install a 18 crosswalk or speed bumps or crosshatching at 19 this facility, correct? 20 A. Correct. 21 Q. Let me show you what was admitted as 22 Exhibit 4, the photos Mr. Pointer has signed. 23 Again, I'm asking only if you know. I don't 24 want you to guess?</p>	<p style="text-align: right;">Page 108</p> <p>1 Q. Can you estimate the distance from the 2 place at the curb that's depicted there where 3 the hedge meets the grass; do you see where I'm 4 referring to? 5 A. Yes. 6 Q. The distance from the curb along that 7 white line that's painted there, in that 8 direction to the center line of the roadway, 9 can you make an estimate based on your 10 knowledge of how far that is? 11 A. No. 12 Q. Can you make an estimate again based on 13 your knowledge looking at the photograph at the 14 bottom of the page on a straight line from the 15 center line to what appears to be the entrance 16 door; do you see that? 17 A. Yes. 18 Q. Can you estimate how far it is from 19 that center line to the curb in front of the 20 entrance door? 21 A. Can you repeat that. 22 Q. Yeah. Can you provide us with an 23 estimate, based on your own knowledge, of how 24 far it is from the curb directly in front of</p>
<p style="text-align: right;">Page 107</p> <p>1 A. Okay. 2 Q. You can estimate, but I'm not asking 3 you to guess. Looking at the top photograph, 4 you see where the what appears to be a hedge in 5 front of the white pickup is? 6 A. Yes. 7 Q. Do you see that in the photograph? 8 A. Yes. 9 Q. As you're looking at the photograph to 10 the left, there appears to be a grass median, 11 correct? 12 A. Yes. 13 Q. Okay. From where the grass median on 14 the photograph meets the hedge, the left side 15 of the hedge, which I think we all understand 16 is going to be the east side of the hedge, 17 correct? 18 A. Yes. 19 Q. All right. There is two yellow posts 20 that appear to be the same height as the hedge, 21 correct? 22 A. Yes. 23 Q. Do you know what those posts are for? 24 A. No.</p>	<p style="text-align: right;">Page 10</p> <p>1 the entrance door to the center line in the 2 roadway that's depicted in this photograph? 3 A. Three feet. 4 MR. HALE: I don't think he 5 understands the question. 6 MR. FEIGELSON: Let me -- 7 MR. RUDSTROM: Maybe refer to it 8 as a double yellow line. 9 BY MR. FEIGELSON: 10 Q. Do you see the entranceway to the 11 store. I appreciate counsel helping me. It 12 appears to be a sidewalk in front of the 13 entrance door, correct? 14 A. Yes. 15 Q. And there appears to be a curb coming 16 towards me? 17 A. Yes. 18 Q. From that curb in front of the 19 entranceway to what appears to be a double line 20 in the roadway in front of the store? 21 A. Uh-huh. 22 Q. It appears to be a double line in the 23 center of the roadway, correct? 24 A. Yes.</p>

	Page 110		Page 112
1	Q. This double line I'm pointing to?	1	facilities at Winchester and across the roadway
2	A. Yes.	2	there is a drawing that depicts there is
3	Q. Can you provide us with an estimate of	3	suppose to be crosswalks?
4	how far it is from the edge of the curb to the	4	MR. FEIGELSON: Objection.
5	double line that appears to be in the center of	5	THE WITNESS: I don't know.
6	the roadway?	6	BY MR. HALE:
7	MR. RUDSTROM: I'll remind you	7	Q. Let me ask it this way. Does it appear
8	that he asked you not to guess.	8	there are two dark lines drawn across what
9	BY MR. FEIGELSON:	9	would be the path of the traveled roadway to
10	Q. And I also asked you based on your	10	the area that would be very near to the exit
11	knowledge?	11	and entrance to the Kroger facility?
12	A. I don't know.	12	A. Could you repeat that.
13	Q. That's a good answer. That's fine,	13	Q. I'm asking whether there are two dark
14	thank you.	14	lines drawn across the roadway directly across
15	Do you have any knowledge of anything	15	from the exit and entranceway to the Kroger
16	Inland Western Memphis Winchester LLC did or	16	store, and I'll point to it, does the diagram
17	didn't do to cause or contribute to the cause	17	depict two dark lines across the roadway?
18	of Ms. Brooks being struck by a vehicle in this	18	A. I see a line. I don't see a second
19	parking lot?	19	line, but there is a line.
20	A. No.	20	Q. Okay, and two of them, one here and two
21	Q. Do you know if anyone in your office	21	of them right in front of the entrance and the
22	would have any such knowledge?	22	exit to the facility; is that right?
23	A. No.	23	A. Yes.
24	MR. FEIGELSON: Nothing further.	24	MR. HALE: Okay, that's all I
	Page 111		Page 113
1	REDIRECT EXAMINATION		
2	BY MR. HALE:	1	have got. I have no more questions.
3	Q. I have a couple quick follow-ups.	2	MR. RUDSTROM: I have no
4	Just to help you, you were asked again by Mr.	3	questions.
5	Feigelson about those posts and what they're	4	
6	for. Let me show you another picture that I	5	(Signature waived)
7	believe depicts the posts and looks like it's a	6	
8	handicapped sign; is that what that is?	7	AND FURTHER THE DEPONENT SAITH NOT.
9	A. Yes.	8	
10	Q. You think on the top of the posts that	9	
11	are depicted in Exhibit 4, there is a	10	
12	handicapped sign; it's just out of view?	11	
13	MR. RUDSTROM: Are you asking him	12	
14	whether the handicapped sign is on top of the	13	
15	post?	14	
16	BY MR. HALE:	15	
17	Q. It appears that's the handicapped sign	16	
18	which we can't see because it's cut off in the	17	
19	picture; is that right?	18	
20	A. Looks like it.	19	
21	Q. Okay. Okay, and one more question.	20	
22	The drawing that's now Exhibit 5 that depicts	21	
23	the property, does it appear that that drawing	22	
24	at or near the front doors of the Kroger	23	
		24	

Page 114

1 **C E R T I F I C A T E**
2 STATE OF TENNESSEE)
3 COUNTY OF SHELBY .)

4
5 I, AMY DILLINGER, CSR, RPR, a Notary Public in
and for the said state and county, hereby
certify that the foregoing deposition was taken
6 before me at the time and place specified in
the caption hereof, and the said witness was
7 first duly sworn by me.

I further certify that the testimony of said
8 witness was taken down in stenograph by myself
and thereafter transcribed and reduced to
9 typewriting under my direction, and constitutes
a full, true and correct record of the
10 foregoing deposition.

I further certify that I am not agent,
11 attorney or counsel for any of the parties, and
that I am in no way interested in the event of
12 the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my
13 hand and official seal this day of
October, 2009.

14
15 _____
16 AMY DILLINGER, CSR, RPR
NOTARY PUBLIC AT LARGE
17 MY COMMISSION EXPIRES: January 12, 2010.
18
19
20
21
22
23
24

ACORD CERTIFICATE OF INSURANCE		DATE (MM/DD/YYYY) 11/26/2007																																																										
<p>PRODUCER Aon Risk Services, Inc. of Illinois 200 East Randolph Chicago IL 60601 USA</p> <p>PHONE: (866) 283-7122 FAX: (847) 953-5390</p> <p>INSURED Inland Western Retail Real Estate Trust, Inc. 2901 Butterfield Road Oak Brook IL 60523 USA</p>		<p>THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONVEYS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.</p> <table border="1"> <thead> <tr> <th>INSURERS AFFORDING COVERAGE</th> <th>NAIC #</th> </tr> </thead> <tbody> <tr> <td>INSURER A: American Home Assurance Co.</td> <td>19380</td> </tr> <tr> <td>INSURER B: Illinois National Insurance Co</td> <td>23817</td> </tr> <tr> <td>INSURER C:</td> <td></td> </tr> <tr> <td>INSURER D:</td> <td></td> </tr> <tr> <td>INSURER E:</td> <td></td> </tr> </tbody> </table>	INSURERS AFFORDING COVERAGE	NAIC #	INSURER A: American Home Assurance Co.	19380	INSURER B: Illinois National Insurance Co	23817	INSURER C:		INSURER D:		INSURER E:																																															
INSURERS AFFORDING COVERAGE	NAIC #																																																											
INSURER A: American Home Assurance Co.	19380																																																											
INSURER B: Illinois National Insurance Co	23817																																																											
INSURER C:																																																												
INSURER D:																																																												
INSURER E:																																																												
<p>THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.</p> <table border="1"> <thead> <tr> <th>INSR AGGREGATE</th> <th>TYPE OF INSURANCE</th> <th>POLICY NUMBER</th> <th>POLICY EFFECTIVE DATE (MM/DD/YY)</th> <th>POLICY EXPIRATION DATE (MM/DD/YY)</th> <th>LIMITS</th> </tr> </thead> <tbody> <tr> <td rowspan="2">A</td> <td>GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input checked="" type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR <input checked="" type="checkbox"/> XLI Included</td> <td rowspan="2"></td> <td rowspan="2">10/01/07</td> <td rowspan="2">12/01/08</td> <td>EACH OCCURRENCE</td> </tr> <tr> <td>DAMAGE TO RENTED PREMISES (Ex occurrence) MED EXP (Any one person)</td> </tr> <tr> <td rowspan="2">B</td> <td>GENL AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJ <input checked="" type="checkbox"/> LOC</td> <td rowspan="2">8E6564926</td> <td rowspan="2">10/01/07</td> <td rowspan="2">12/01/08</td> <td>PERSONAL & ADV INJURY</td> </tr> <tr> <td>GENERAL AGGREGATE PRODUCTS - COMP/OPP AGG</td> </tr> <tr> <td rowspan="5"></td> <td>AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON OWNED AUTOS</td> <td rowspan="5"></td> <td rowspan="5"></td> <td rowspan="5"></td> <td>COMBINED SINGLE LIMIT (Ex accident)</td> </tr> <tr> <td>BODILY INJURY (Per person)</td> </tr> <tr> <td>BODILY INJURY (Per accident)</td> </tr> <tr> <td>PROPERTY DAMAGE (Per accident)</td> </tr> <tr> <td>AUTO ONLY - EA ACCIDENT OTHER THAN AUTO ONLY: EA ACC AGG</td> </tr> <tr> <td rowspan="5">C</td> <td>CARAGE LIABILITY <input type="checkbox"/> ANY AUTO</td> <td rowspan="5"></td> <td rowspan="5"></td> <td rowspan="5"></td> <td>EACH OCCURRENCE</td> </tr> <tr> <td>AGGREGATE</td> </tr> <tr> <td><input checked="" type="checkbox"/> DEDUCTIBLE</td> </tr> <tr> <td><input checked="" type="checkbox"/> RETENTION</td> </tr> <tr> <td>WC STATUS EL. EACH ACCIDENT EL. DISEASE-EA EMPLOYEE EL. DISEASE-POLICY LIMIT</td> </tr> <tr> <td colspan="5">DESCRIPTION OF OPERATIONS/LOCATION/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS RE: Kroger Store #437 - Winchester Commons, Memphis, TN 38125 . Named insured includes: Inland Western Memphis Winchester, L.L.C., a Delaware limited liability company. The Kroger Co. (and Kroger's affiliates and subsidiaries) is included as additional insured solely with respect to general liability coverage as required by</td> <td></td> </tr> <tr> <td colspan="2"> <p>Kroger Limited Partnership I Attn: Real Estate P.O. Box 1878 Memphis TN 38101-1878 USA</p> </td> <td colspan="3"> <p>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURE, ITS AGENTS OR REPRESENTATIVES.</p> </td> <td></td> </tr> <tr> <td colspan="2"></td> <td colspan="3">AUTHORIZED REPRESENTATIVE</td> <td></td> </tr> </tbody> </table>			INSR AGGREGATE	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input checked="" type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR <input checked="" type="checkbox"/> XLI Included		10/01/07	12/01/08	EACH OCCURRENCE	DAMAGE TO RENTED PREMISES (Ex occurrence) MED EXP (Any one person)	B	GENL AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJ <input checked="" type="checkbox"/> LOC	8E6564926	10/01/07	12/01/08	PERSONAL & ADV INJURY	GENERAL AGGREGATE PRODUCTS - COMP/OPP AGG		AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON OWNED AUTOS				COMBINED SINGLE LIMIT (Ex accident)	BODILY INJURY (Per person)	BODILY INJURY (Per accident)	PROPERTY DAMAGE (Per accident)	AUTO ONLY - EA ACCIDENT OTHER THAN AUTO ONLY: EA ACC AGG	C	CARAGE LIABILITY <input type="checkbox"/> ANY AUTO				EACH OCCURRENCE	AGGREGATE	<input checked="" type="checkbox"/> DEDUCTIBLE	<input checked="" type="checkbox"/> RETENTION	WC STATUS EL. EACH ACCIDENT EL. DISEASE-EA EMPLOYEE EL. DISEASE-POLICY LIMIT	DESCRIPTION OF OPERATIONS/LOCATION/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS RE: Kroger Store #437 - Winchester Commons, Memphis, TN 38125 . Named insured includes: Inland Western Memphis Winchester, L.L.C., a Delaware limited liability company. The Kroger Co. (and Kroger's affiliates and subsidiaries) is included as additional insured solely with respect to general liability coverage as required by						<p>Kroger Limited Partnership I Attn: Real Estate P.O. Box 1878 Memphis TN 38101-1878 USA</p>		<p>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURE, ITS AGENTS OR REPRESENTATIVES.</p>						AUTHORIZED REPRESENTATIVE			
INSR AGGREGATE	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS																																																							
A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input checked="" type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR <input checked="" type="checkbox"/> XLI Included		10/01/07	12/01/08	EACH OCCURRENCE																																																							
	DAMAGE TO RENTED PREMISES (Ex occurrence) MED EXP (Any one person)																																																											
B	GENL AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PROJ <input checked="" type="checkbox"/> LOC	8E6564926	10/01/07	12/01/08	PERSONAL & ADV INJURY																																																							
	GENERAL AGGREGATE PRODUCTS - COMP/OPP AGG																																																											
	AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON OWNED AUTOS				COMBINED SINGLE LIMIT (Ex accident)																																																							
	BODILY INJURY (Per person)																																																											
	BODILY INJURY (Per accident)																																																											
	PROPERTY DAMAGE (Per accident)																																																											
	AUTO ONLY - EA ACCIDENT OTHER THAN AUTO ONLY: EA ACC AGG																																																											
C	CARAGE LIABILITY <input type="checkbox"/> ANY AUTO				EACH OCCURRENCE																																																							
	AGGREGATE																																																											
	<input checked="" type="checkbox"/> DEDUCTIBLE																																																											
	<input checked="" type="checkbox"/> RETENTION																																																											
	WC STATUS EL. EACH ACCIDENT EL. DISEASE-EA EMPLOYEE EL. DISEASE-POLICY LIMIT																																																											
DESCRIPTION OF OPERATIONS/LOCATION/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS RE: Kroger Store #437 - Winchester Commons, Memphis, TN 38125 . Named insured includes: Inland Western Memphis Winchester, L.L.C., a Delaware limited liability company. The Kroger Co. (and Kroger's affiliates and subsidiaries) is included as additional insured solely with respect to general liability coverage as required by																																																												
<p>Kroger Limited Partnership I Attn: Real Estate P.O. Box 1878 Memphis TN 38101-1878 USA</p>		<p>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURE, ITS AGENTS OR REPRESENTATIVES.</p>																																																										
		AUTHORIZED REPRESENTATIVE																																																										

Holder Identifier : Western

Certificate No : 570030016

EXHIBIT

ACORD CERTIFICATE OF INSURANCE		DATE (MM/DD/YYYY) 10/18/2007				
PRODUCER Adm Risk Services, Inc. of Illinois 200 East Randolph Chicago IL 60601 USA PHONE - (866) 283-7122 FAX - (847) 953-5390		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONVEYS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.				
		INSURERS AFFORDING COVERAGE NAIC # INSURER A: American Home Assurance Co. 19380 INSURER B: AIG Excess Liability Insurance Co., Ltd. 10932 INSURER C: INSURER D: INSURER E:				
THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.						
DECR	ADDP INSUR	TYPE OF INSURANCE	POLICY NUMBER	POLICY INFFECTIVE DATE(MM/DD/YY)	POLICY EXPIRATION DATE(MM/DD/YY)	LIMITS
A		GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input checked="" type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR <input checked="" type="checkbox"/> XCU Included GENL AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PRO- JECT <input checked="" type="checkbox"/> LOC		10/01/07	12/01/08	EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Ex occurrence) MED EXP (As one person) PERSONAL & ADV INJURY GENERAL AGGREGATE PRODUCTS - COMP/OPP AGG
		AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON OWNED AUTOS				COMBINED SINGLE LIMIT (Ex accident) BODILY INJURY (Per person) BODILY INJURY (Per accident) PROPERTY DAMAGE (Per accident)
		GARAGE LIABILITY <input type="checkbox"/> ANY AUTO				AUTO ONLY - EA ACCIDENT OTHER THAN EA ACC AUTO ONLY: AGG
B		EXCESS/UMBRELLA LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> DEDUCTIBLE <input checked="" type="checkbox"/> RETENTION	BE6564926	10/01/07	12/01/08	EACH OCCURRENCE AGGREGATE WC STATUTORY LIMITS EI EACH ACCIDENT EI DISEASE-EA EMPLOYEE EI DISEASE-POLICY LIMIT
		WORKERS COMPENSATION AND EMPLOYERS LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED If yes, describe under SPECIAL PROVISIONS below				
		OTHER				
DESCRIPTION OF OPERATIONS/LOCATION/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS RE: Kroger Store #437 - Winchester Commons, Memphis, TN 38125 . Named insured includes: Inland Western Memphis Winchester, L.L.C., a Delaware limited liability company. The Kroger Co. (and Kroger's affiliates and subsidiaries) is included as additional insured solely with respect to general liability coverage as required by						
Kroger Limited Partnership 1 Attn: Cindy Boland 2175 Parklake Drive Atlanta GA 30345 USA			SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILING TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.			
			AUTHORIZED REPRESENTATIVE <i>Howard M. Campbell</i>			



SPICER, FLYNN & RUDSTROM, PLLC

ATTORNEYS AT LAW. EST. 1963

Kenneth R. Rudstrom
email: krr@sfrlaw.com
direct: 901.522.2303
www.sfrlaw.com

175 Toyota Plaza, Suite 800
Memphis, TN 38103
901.523.1333
fax: 901.526.0213

February 19, 2009



David Feigelson, Esq.
Petkoff and Feigelson
305 Washington Avenue
Memphis, TN 38103-1911

RE: Claim No: 2007I245480
Client: Kroger
Adverse Party: Lillian Brooks & Anthony Brooks
Our File No.: 0013.042340

Dear David:

As a follow-up to our last telephone conversation, please be advised that on behalf of my client, The Kroger Company, I am asking to tender the defense of Kroger to your client and Kroger's landlord, Inland Western Memphis Winchester, LLC, pursuant to the lease agreement between the parties. Please advise.

Very truly yours,

SPICER, FLYNN & RUDSTROM, PLLC

Rick Rudstrom

RR:nj
cc: Michelle Walker

NASHVILLE
Bank of America Plaza
414 Union Street, Suite 1700
Nashville, TN 37219
615.259.9080
fax 615.259.1522

KNOXVILLE
810 South Gay Street
Suite 1400
Knoxville, TN 37929
865.673.8516
fax 865.673.8972

CHATTANOOGA
537 Market Street
Suite 203
Chattanooga, TN 37402
423.756.0262
fax 423.756.8489





SPICER RUDSTROM, PLLC

Kenneth R. Rodstrom
email: krr@spicerfirm.com
direct: 901.522.2303
www.spicerfirm.com

175 Toyota Plaza, Suite 800
Memphis, TN 38103
901.523.1333
fax: 901.526.0213

February 16, 2011



David Feigelson, Esq.
Petkoff and Feigelson
305 Washington Avenue
Memphis, TN 38103-1911

RE: Claim No: 20071245480
Client: Kroger
Adverse Party: Lillian Brooks & Anthony Brooks
Our File No.: 0013.042340

Dear Dave:

I wanted to advise you that my client, Kroger, was speaking directly with your client, their landlord, regarding the landlord's failure to assume Kroger's defense in this matter. I wanted you to be aware that this communication was going on between our respective clients.

It has come to my attention that Kroger is named as an additional insured on the policy of insurance affecting the property in question. Although I have been provided with a copy of the insurance policy and the declaration page, I am asking that you please provide me with a certified copy of this policy showing Kroger as an additional insured.

Also, Kroger is contemplating filing a separate lawsuit based on the lease agreement in this matter and then, at the appropriate time, consolidating the contract case with the tort case. I will keep you advised as to their decision. Should you have any questions please advise.

Very truly yours,

SPICER RUDSTROM, PLLC

Rick Rudstrom

RR:nj
cc: Janice Hayworth

NASHVILLE
Bank of America Plaza
414 Union Street, Suite 1700
Nashville, TN 37219
615.259.9000
fax 615.259.1522

KNOXVILLE
800 South Gay Street
Suite 1100
Knoxville, TN 37902
865.673.8516
fax 865.673.8972

CHATTANOOGA
537 Market Street
Suite 203
Chattanooga, TN 37402
423.756.0263
fax 423.756.8489



13-42340 KLR

LAW FIRM
PETKOFF AND FEIGELSON

DAVID I. FEIGELSON
dfeigelson@pf-law.net

WASHINGTON COURTYARD
305 WASHINGTON AVENUE
MEMPHIS, TENNESSEE 38103-1911

Telephone: (901) 523-1050
Facsimile: (901) 523-1061

February 25, 2011

Via U.S. Mail

Mr. Kenneth R. Rudstrom
SPICER RUDSTROM, PLLC
175 Toyota Plaza
Suite 800
Memphis, TN 38103

RE: *Lillian Brooks and Anthony Brooks v. Tuwayne Shivers, et al.*
Shelby County Circuit Court Docket No. CT-005835-08
Our File No. 13.8032

Dear Rick:

We are in receipt of your February 16, 2011 correspondence in the above-referenced litigation. Kindly provide us with copies of those portions of Inland Western's Insurance Policy which support Kroger's claim that they are named as an additional insured on the Policy. We do not believe that Kroger is a named additional insured on the Policy and, therefore, we are unable to provide you with a certified copy of the Policy showing Kroger as an additional insured, per your request.

Rick, thank you for your cooperation.

Very truly yours,

PETKOFF AND FEIGELSON



David I. Feigelson

DIF:pm

F:\APP\WPPDATA\FILES\P & F FILES\FEIGELSON, D\13-8032\CORRESPONDENCE\LETTERS\COUSNEL\RUDSTROMS.wpd



SR

SPICER RUDSTROM, PLLC

ATTORNEYS AT LAW • EST. 1963

Betty Ann Milligan
email: bam@spicerfirm.com
direct: 901.522.2304
www.spicerfirm.com

175 Toyota Plaza, Suite 800
Memphis, TN 38103
901.523.1333
fax: 901.526.0213

March 1, 2011



David Feigelson, Esq.
305 Washington Avenue
Memphis, Tennessee 38103-1911

Re: *Brooks v. Kroger and Inland Western*
Our File No.: 13.42340

Dear Dave:

Pursuant to your request, attached is the Certificate of Insurance for Inland Western Retail which was effective for a coverage period of October 1, 2007 to December 1, 2008. It clearly provides that Kroger Company and its affiliates are to be additional insureds. Obviously, this coverage afforded to my client was in effect on the date of the loss involving Ms. Brooks. Production of this certificate by Kroger should put to rest any questions your client may have as to whether or not they should be providing a defense and indemnification of Kroger in this matter.

Once again, as a follow-up to the prior letter you received from Rick Rudstrom, please produce a certified copy of the policy that was in effect during this period of time. We would like to have the opportunity to review it to analyze its coverage terms and conditions.

Please advise your client that Kroger fully intends to exercise all rights and remedies available to it in regard to the agreements it has with Inland Western. Thus, we look forward to receiving the certified copy of the policy at your earliest convenience. We would also appreciate hearing from your client concerning their position on their obligation to Kroger arising out of the lease and the insurance agreement.

I look forward to hearing from you in that regard.

NASHVILLE
Bank of America Plaza
414 Union Street, Suite 1700
Nashville, TN 37219
615.259.9080
fax 615.259.1522

KNOXVILLE
800 South Gay Street
Suite 1400
Knoxville, TN 37929
865.673.8516
fax 865.673.8972

CHATTANOOGA
537 Market Street
Suite 203
Chattanooga, TN 37402
423.756.0262
fax 423.756.8489



David Feigelson, Esq.
March 1, 2011
Page 2

Very truly yours,

SPICER RUDSTROM, PLLC



Betty Ann Milligan

BAM:sw
Encl.

2007124-480001

ACORD CERTIFICATE OF INSURANCE PRODUCER Aon Risk Services, Inc. of Illinois 200 East Randolph Chicago IL 60601 USA Phone: (866) 283-7122 FAX: (847) 953-5390		DATE (MM/DD/YYYY) 11/26/2007			
		<small>THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERNS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.</small>			
		INSURERS AFFORING COVERAGE			
		INSURER A: American Home Assurance Co. INSURER B: Illinois National Insurance Co. INSURER C: INSURER D: INSURER E:	NAICS		
			19380 23817		
<small>COVERAGE STATEMENT: THE POLICIES LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.</small>		<small>Holder Identifier : Western Certificate No : 570025054693</small>			
TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIGTS	
		10/01/07	12/01/08	EACH OCCURRENCE \$1,000,000	DAMAGE TO RENTED PREMISES (Ex. ACCIDENT) \$100,000
A GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input checked="" type="checkbox"/> CLAIM MADE <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> EXCLUDED GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PRO- <input checked="" type="checkbox"/> ACT <input checked="" type="checkbox"/> LOC	GL4572271			EXCLUDED	
AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> Hired AUTOS <input type="checkbox"/> NON OWNED AUTOS				COMBINED SINGLE LIMIT (\$4 million)	
				BODILY INJURY (Per person)	
				BODILY INJURY (Per accident)	
				PROPERTY DAMAGE (Per accident)	
				AUTO ONLY - EA ACCIDENT	
				OTHER THAN EA ACC AUTO ONLY: AGG	
B EXCESS AMBRELLA LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIM MADE <input type="checkbox"/> DEDUCTIBLE <input checked="" type="checkbox"/> RETENTION \$10,000	BE6564928	10/01/07	12/01/08	EACH OCCURRENCE \$25,000,000	
				AGGREGATE \$25,000,000	
				WC STATUS/	
				STRICT LIMITS	OTH- ER
				E.L. EACH ACCIDENT	
				E.L. DISEASE-EA EMPLOYEE	
				E.L. DISEASE-POLICY LIMIT	
WORKERS COMPENSATION AND EMPLOYER'S LIABILITY ANY PROFESSOR/FARTHING/EXECUTIVE OFFICER/OWNER EXCLUDED If yes, describe under SPECIAL PROVISIONS below					
GTE22					
<small>DESCRIPTION OF OPERATION/LOCATION/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS</small>					
<small>RE: Kroger Store #437 - Winchester Commons, Memphis, TN 38125. Named insured includes: Inland Western Memphis Winchester, L.L.C., a Delaware limited liability company. The Kroger Co. (and Kroger's affiliates and subsidiaries) is included as additional insured solely with respect to general liability coverage as required by CERTIFICATE OF INSURANCE.</small>					
Kroger Limited Partnership I Attn: Real Estate P.O. Box 1878 Memphis TN 38101-1878 USA		<small>Should any of the above described policies be cancelled before the expiration date thereof, the issuing insurer will endeavor to mail in 30 days written notice to the certificate holder named to the left, but failure to do so shall impose no obligation on the insurer or any kind upon the insured, its agents or representatives.</small>			
		<small>AUTHORIZED REPRESENTATIVE</small>			



SPICER RUDSTROM, PLLC

Betty Ann Milligan
email: bamm@spicerfirm.com
direct: 901.522.2304
www.spicerfirm.com

175 Toyota Plaza, Suite 800
Memphis, TN 38103
901.523.1333
fax: 901.526.0213

June 1, 2011



David Feigelson, Esq.
Petkoff and Feigelson
305 Washington Avenue
Memphis, TN 38103-19111

RE: *Brooks v. Kroger et al.*
My File No.: 13.42340

Dear Dave:

This correspondence is in follow-up to prior letters to you from Rick Rudstrom, specifically of February 16, 2011, and myself, specifically of March 1, 2011; concerning the relationship of your client, Inland Western, and our client, the Kroger Company, as it pertains to insurance coverage. We have, in both letters, requested a certified copy of the policy of insurance of Inland Western regarding the property in question in this particular case. To date, you have not honored that request. Your client has continued to ignore its obligations to Kroger in regard to this claim. Kroger even had to supply Inland Western with the Certificate of Insurance which clearly reflected that my client was an additional insured under the policy of insurance obtained by your client for this property. Even after providing that Certificate, your client has been silent on the issue of assuming the defense of Kroger in this case and providing indemnification to it. Obviously, your client is not acting in good faith in this situation.

Please consider this correspondence notice to your client that the Kroger Company intends to pursue a Declaratory Judgment action against it to enforce the provisions, terms, and conditions of the policy of insurance within which Kroger has been named an additional insured. We will be seeking defense, indemnification, recovery of expenses to Kroger for the defense of this particular matter, as well as attorney's fees for pursuit of the Declaratory Judgment. It is our position that your clients continued refusal to acknowledge its obligations to the Kroger Company constitutes bad faith. This bad faith refusal to honor the terms of the contractual agreement between the parties is totally unacceptable and a clear violation of the applicable law.

We regret that your client has placed us in an untenable position, but we fully intend to exercise our rights under the lease agreement with Inland Western as well as under its insurance policy naming Kroger as an additional insured to the fullest extent possible. Please inform your client immediately concerning our position.

EXHIBIT

Very truly yours,

SPICER RUDSTROM, PLLC

Betty Ann Milligan

BAM/sw